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Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1992

CITY OF VERNON,
Petitioner,
VS.
SOUTHERN CALIFORNIA EDISON COMPANY,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HUFSTEDLER, KAUS & ETTINGER
SHIRLEY M. HUFSTEDLER
355 S. Grand Avenue
Thirty-Ninth Floor
Los Angeles, California
90071-3101
Telephone: (213) 617-7070

PAUL, HASTINGS, JANOFSKY
& WALKER
Twenty-Third Floor
555 South Flower Street
Los Angeles, California 90071
Telephone: (213) 683-6223

GOLDBERG, FIELDMAN
& LETHAM, P.C.
DAVID C. HJELMFELT, P.C.
CHANNING D. STROTHER, JR.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 463-8300

Attorneys for Petitioner

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

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APPENDIX

No. 90-56281

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF VERNON,
Plaintiff-Appellant,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
October 11, 1991 — Pasadena, California

Filed February 7, 1992

Before: Mary M. Schroeder, Edward Leavy and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Fernandez D.C. No. CV-83-8137-MRP

OPINION

SUMMARY

Antitrust

Affirming in part, reversing in part and remanding a district court grant of summary judgment, the court of appeals held that a public utility did not engage in anticompetitive conduct by denying a city access to power transmission lines or engaging in a group boycott that prevented the city from obtaining bulk power from other suppliers.

Appellant City of Vernon received electric power from Southern California Edison Company and other electrical utilities over Edison's transmission lines. It was Edison's responsibility to see that Vernon received all of the power it needed. Most of Edison's

conduct with respect to Vernon was regulated by the FERC, including the wholesale rates Edison charged, the terms of integration agreements, and transmission rights on Edison's high voltage lines. Vernon brought an action against Edison alleging that Edison had engaged in anticompetitive conduct by denying Vernon access to power transmission lines, filing discriminatory rate schedules, and engaging in a group boycott that prevented Vernon from obtaining bulk power from other suppliers. Vernon sought damages and injuntive relief on each of its claims. The district court granted summary judgment for Edison, and denied reconsideration of its decision.

[1] Vernon did not appear to dispute the fact that retail customers would pay increased rates if it received the access sought. Nor did Vernon appear to dispute the fact that Edison was legitimately concerned about the retail rates in making its facilities access decisions. **[2]** Thus, the district court did not err in granting summary judgment against Vernon on its relative size share access claim. Vernon failed to show just why Edison was required to cease using its own facility so that Vernon could begin using it. This was not a case where Edison simply refused to supply Vernon with its power needs. The demand that Edison turn over its facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head. **[3]** In addition, Vernon cited no authority in support of its theory that "reasonably" access to Edison's facilities must take the form of relative size share access.

[4] Although the integrated operations agreement was one way in which Edison could meet its obligation to provide reasonable access to its essential facilities, the district court held that to the extent that Edison had a duty to integrate Vernon's power purchases, the duty was limited by legitimate business justifications. Edison offered none. **[5]** Had that determination been made at the end of a trial, there would not be error; summary judgment was another matter entirely. **[6]** Even though Edison had a duty to integrate capacity resources on reasonable notice, there was nothing to suggest that Edison was required to do so through the special condition 12 claim. Thus, summary judgment on this claim was appropriate.

[7] The court noted that the contractual right to interrupt service did not grant Edison the freedom to act anticompetitively. [8] Nonetheless, summary judgment was appropriate on this claim. There was no evidence that transmission was interrupted at any time at the behest of any person employed by Edison other than a dispatcher, who was acting as he did for unknown reasons. There was no evidence that any person with management or supervisory authority ever told any dispatchers to interrupt or to refuse transmissions for any anticompetitive reason or that dispatchers were acting on a policy of wrongfully refusing or interrupting transmission. Summary judgment on this claim was appropriate. [9] Nor was any evidence introduced by Vernon that Edison conspired with anyone to deny access to the Pacific Intertie. Because the Sherman Act requires "concerted action" by more than one entity, the district court properly granted judgment on this claim. [10] Concerning Vernon's Edison-Nevada Power boycott claims, the court agreed that Vernon's evidence was far too weak. There was no evidence that unnamed Edison dispatchers entered into conspiracies with Nevada Power dispatchers to boycott Vernon's attempt to purchase power.

[11] The court agreed with the district court that the serious flaws in the only damage study that could be proffered to the jury placed Vernon in the position of having no proper proof of damages at all. Thus, the district court did not err when it awarded summary judgment based upon his lack of evidence. [12] However, the court reversed the denial of injunctive relief as to the integrated operations agreement and remanded to the district court for consideration of the propriety of such relief if Edison unreasonably refused access to its essential facilities.

COUNSEL

Shirley M. Hufstedler, Hufstedler, Kaus & Ettinger, Los Angeles, California, for the plaintiff-appellant.

Paul G. Bower, Gibson, Dunn & Crutcher, Los Angeles, California, for the defendant-appellee.

OPINION

FERNANDEZ, Circuit Judge:

The City of Vernon ("Vernon") brought this action against Southern California Edison Company ("Edison") and alleged that Edison had engaged in anticompetitive conduct by denying Vernon access to power transmission lines, by filing discriminatory rate schedules, and by engaging in a group boycott that prevented Vernon from obtaining bulk power from other suppliers. Vernon sought damages and injunctive relief on each of its claims. The district court granted summary judgment in favor of Edison. Vernon appeals. We affirm in part and reverse in part.

BACKGROUND

Edison is an investor-owned fully integrated public utility, which generates, transmits, and distributes electric power within its service area, an area which includes much of Central and Southern California. Vernon is located in Edison's service area, but it has its own electric distribution system, and is the sole provider of retail electric service within its own boundaries. Vernon is bounded by Edison territory and by the City of Los Angeles, which also has its own service territory operated by the Los Angeles Department of Water and Power.

Although Vernon distributes power at retail within its boundaries, it generates a very small portion of its own electricity. Thus, it obtains most of its power in bulk elsewhere and receives it over Edison's transmission lines. That wholesale power is purchased from Edison or from other electrical utilities. It is Edison's responsibility to see to it that Vernon receives all of the power that it needs. Edison also purchases power from and sells it to other utilities.

Vernon and Edison have a long history of disputes over rates, access to Edison's transmission facilities, and the integration of non-Edison power sources into Edison's operating system for the

benefit of Vernon.[1] Most of Edison's conduct with respect to Vernon is regulated by the Federal Energy Regulatory Commission (FERC), including the wholesale rates Edison charges, the terms of integration agreements, and transmission rights on Edison's high voltage lines.[2]

Vernon's denial of access claims (sometimes called foreclosure claims) are based upon Edison's refusal to provide relative size share[3] access to its transmission lines, particularly the Pacific Intertie[4] and lines from the desert Southwest. Vernon also claims entitlement to what the district court characterized as "unlimited" access to Edison's 220 kV network.[5]

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[1]Integration of non-Edison power sources requires Edison to transmit power obtained from other sources while giving credit to the wholesale customer which obtained the outside power capacity credit because Edison need not maintain as much power generation capacity if power can be imported.

[2]The FERC regulates Edison's conduct pursuant to the Federal Power Act. 16 U.S.C. § 824.

[3]"Relative size share" simply refers to Vernon's theory that if it uses, for example, 1.5% of the electricity transmitted into the Edison territory then it should receive 1.5% of the firm transmission access to the EHV (Extra High Voltage) transmission lines. While Vernon's damage study based damages on an assumption that it was entitled to relative size share access, Vernon claims that it should receive a "fair share" and Edison has failed to propose any other way of calculating Vernon's fair share.

[4]The Pacific Intertie is a group of high-power transmission lines which bring hydroelectric power to Edison's control area from the Pacific Northwest. Edison shares ownership in the Pacific Intertie with several other utilities, so that it is entitled to only a portion of the lines' total capacity. The lines consist of two 500 kV AC lines, and one 800 kV DC line.

[5]The 220 kV network is the local transmission net work through which Edison transmits energy directly to its retail and wholesale customers. Vernon's claim is that its access should be unlimited unless there is insufficient capacity to meet the total demand. In that case, Vernon contends that "the constraint on the system should be shared."

Vernon claims that Edison has refused to enter into reasonable agreements to integrate Vernon's firm purchases from other sources. These claims involve a generic Integrated Operations Agreement (IOA) and Special Condition 12 (SC-12). The IOA which Edison submitted to Vernon provided that outside power resources could be integrated into Edison's service system on such terms and at such time as Edison deemed appropriate. The FERC determined that parts of the IOA, including the absence of a reasonable notice provision, were unreasonable. *Southern Cal. Edison Co.*, 41 F.E.R.C. ¶ 61,188 at 61,493-94 (1987) and *Southern Cal. Edison Co.*, 52 F.E.R.C. ¶ 61,299 at 62,202-03 (1990), *vacated in part*, 55 F.E.R.C. ¶ 61,258 (1991). SC-12 was entered into as a partial settlement of Vernon's claims that Edison was unreasonably denying integration and access. SC-12 permits Vernon to import and obtain capacity credit for outside resources without integration pursuant to an IOA.

Vernon also asserts that Edison acted anticompetitively in interrupting or refusing transmission from Nevada Power Company (Nevada Power) to Vernon. It also claims that Edison and Nevada Power engaged in a group boycott designed to keep Vernon from purchasing power from Nevada Power. Vernon and Edison entered into a contract for interruptible transmission service under which Vernon could purchase power from outside supplier on a non-firm basis. That power would then be transmitted over Edison lines. The contract provided for interruption by Edison at any time and for any reason.

The parties brought several motions for summary judgment, including those which ultimately resulted in judgment for Edison on all claims. The district court granted summary judgment on the foreclosure claims on several grounds. As to Vernon's claim that it was entitled to relative size share access, the district court determined that Edison had established a legitimate business reason for its refusal to provide the requested access, which Vernon had failed to refute. Summary judgment on the integration claims was granted on the ground that Edison had shown a legitimate business justification for not providing for integration on eighteen months' notice. The court granted summary judgment on the SC-12 claims because Edison had no obligation to

offer SC-12 and its failure to offer it sooner was not an antitrust violation. The court granted summary judgment on the interruptible transmission service claims because Vernon had not quantified damages. The court viewed that claim as arising from a contractual dispute, and found no material issue of fact regarding whether Edison's reasons for interrupting were legitimate.

The district court also granted Edison's motion for summary judgment on its claims that Edison had discriminated against Vernon in its rates[6] and on the claim that Edison and Nevada Power engaged in a group boycott against Vernon. The court concluded that summary judgment was appropriate because Vernon had presented no evidence of damages and Vernon had failed to introduce evidence sufficient to sustain a finding of concerted action. Eventually, the court determined that judgment was appropriate on all of Vernon's claims, including a claim that Edison had conspired with others to deny access to the Pacific Intertie. Vernon asked the district court to compel Edison to bring a motion for summary judgment on the latter claim, but the district court declined to require the filing of a separate motion.

After entry of judgment, Vernon filed a timely motion for reconsideration. The district court declined to reconsider its decision.[7] Vernon filed a timely notice of appeal.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction under 15 U.S.C. §§15 and 26. We have jurisdiction under 28 U.S.C. § 1291.

We review a grant of summary judgment de novo. *Image Technical Serv., Inc. V. Eastman Kodak Co.*, 903 F.2d 612, 614 (9th Cir. 1990), *cert. granted,* 111 S. Ct. 2823, 115 L. Ed. 2d 994

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[6]Vernon has not appealed the district court's grant of summary judgment on its rate claim.

[7]Though Vernon appealed from the denial of its motion for reconsideration, it presented no argument on appeal that the district court abused its discretion in denying the motion. In any event, we find no abuse of discretion because Vernon should have been able to present evidence of pretext, if any, at the original summary judgment hearings.

(1991). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

Summary judgment is appropriate if the nonmoving party bears the ultimate burden of proof at trial as to an element essential to its case, and fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

DISCUSSION

To establish a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2(§ 2), Vernon would have to show (1) that Edison possessed monopoly power in the relevant market; (2) that it willfully acquired or maintained that power; and (3) that Vernon suffered a causal antitrust injury. *Oahu Gas Serv., Inv. v. Pacific Resources, Inc.,* 838 F.2d 360, 363 (9th Cir.), *cert. denied,* 488 U.S. 870, 109 S.Ct. 180, 102 L. Ed. 2d 149 (1988). An attempt to monopolize is also actionable under § 2. Attempted monopolization has three elements: "specific intent to monopolize, predatory or anticompetitive conduct and a dangerous probability of success." *Drinkwine v. Federated Publications, Inc.,* 780 F.2d 735, 740 (9th Cir. 1985), *cert. denied,* 475 U.S. 1087, 106 S. Ct. 1471, 89 L. Ed. 2d 727 (1986). Vernon would also be required to show causal antitrust injury in an attempted monopoly case. *California Computer Products, Inc. v. IBM Corp.,* 613 F.2d 727, 736 (9th Cir. 1979).

To establish a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (§ 1), Vernon would have to prove "three elements: (1) an agreement or conspiracy among two or more persons or distinct business entities: (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually restrains competition." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.,* 924 F.2d 1484, 1488 (9th Cir. 1991) (citation and quotations omitted).

A. *Essential Facility Claims.*

Vernon's foreclosure claims are based on its assertion that the EHV transmission lines, such as the Pacific Intertie and the Southwest lines, as well as the 220 kV grid, are essential facilities to which Edison has improperly refused Vernon access. In our opinion in the companion to this case, *City of Anaheim v. Southern California Edison Co.*, No. 90-56375, slip op. 1221 (9th Cir. 1991), filed on the same date as this opinion, we have outlined the nature of the essential facility doctrine and the elements necessary to prove liability for the refusal to allow use if an essential facility. *Id.* at slip op. 1233-36. *See also Alaska Airlines, Inc. v. United Airlines, Inc.*, No. 90-55162, slip op. 14751, 14762-68 (9th Cir. Oct. 29, 1991). Of course, that same law applies here.

However, in this case the district court assumed for purposes of the summary judgment motion "that there was competition between Edison and Vernon, that Edison had monopoly power in a properly defined market, and that Edison's transmission lines are essential facilities." Therefore, we will only determine whether given those assumptions Edison has committed an anti-trust violation by refusing to give all of the access to the facilities that Vernon desires.[8]

1. *Relative Size Share Access.*

The district court determined that there were no genuine issues of material fact with respect to Edison's claim that it had a legitimate business justification for refusing relative size share access. Vernon asserted that Edison's business justification was insufficient as a matter of law, but also asserted that the alleged justification was untrue. However, as noted by the district court, Vernon did not point to any facts in opposition to Edison's motion for summary judgment which would create a material issue of

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[8]We note that the district court granted summary judgment on at least some of the claims because Vernon failed to offer sufficient proof of damages from alleged misconduct. We will address the damages issue in Part C of this opinion.

fact. Instead, Vernon argued that if the asserted justification was not insufficient as a matter of law, a jury should be permitted to decide whether a slight increase in retail prices to Edison's customers was a legitimate business reason for Edison's refusal to grant relative size share transmission access.

[1] At the time of the summary judgment motion, Vernon did not appear to dispute the fact that retail customers would pay increased rates if it received the access sought — indeed, Vernon's damage study reflected that fact. Nor did Vernon appear to dispute the fact that Edison was legitimately concerned about the retail rates in making its facilities access decisions.[9]

[2] The district court did not err in granting summary judgment against Vernon on the relative size share access claim. Although the defendant generally has the burden of coming forward with a legitimate business justification after the plaintiff has shown evidence of monopolistic intent, the plaintiff, in this case Vernon, ultimately has the burden of proving that the defendant acted without a legitimate business justification. *Image Technical*, 903 F.2d at 620 n.9; *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1339 (9th Cir. 1983). *Cf. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-611, 105 S. Ct. 2847, 2860-61, 86 L. Ed. 2d 467 (1985) (implying that defendant has burden of production and proof). In order to survive summary judgment, Vernon had to point to evidence demonstrating that there was a genuine issue of material fact as to whether Edison in fact acted on the asserted grounds. Having failed to do so, summary judgment was appropriate. Furthermore, Vernon fails to demonstrate just why Edison is required to cease using its own facility so that Vernon can begin using it. This is not a situation where Edison had no use for the facility and arbitrarily denied someone else its use. *See MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir.) (AT&T was not asked to abandon its facilities; no business reason shown for refusal), *cert. denied*, 464

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[9]It is legitimate for Edison to refuse access that will affect its rates to the detriment of its customers. *See City of Anaheim*, slip op. 1237.

U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983). Nor is it a case where Edison simply refused to supply Vernon with its power needs. *See Otter Trail Power Co. v. United States*, 410 U.S. 366, 378, 93 S. Ct. 1022, 1030, 35 L. Ed. 2d 359 (1973). In fine, Edison clearly had a use for its lines. As we pointed out in *City of Anaheim*, slip op. 1236, the demand that Edison turn over its facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head.

[3] But, even had Vernon offered some evidence which raised a material issue of fact with respect to Edison's reasons for refusing relative size share access, we can find no authority — and Vernon has pointed to none — which supports Vernon's theory that "reasonable" access to Edison's facilities must take the form of relative size share access. Even more to the point, Vernon admits that it never requested relative size share access to Edison's transmission facilities. The district court properly granted summary judgment.

2. *Integrated Operations Agreement.*

[4] The IOA was one way in which Edison could meet its obligation to provide reasonable access to its essential facilities. The district court held that to the extent that Edison had a duty to integrate Vernon's power purchases, the duty was limited by legitimate business justifications. The court found no triable issue of fact on this claim and determined that summary judgment was appropriate because Edison had a legitimate business justification for not providing for an eighteen month notice period[10] when the FERC had determined that a three year period was reasonable.

Assuming, as the district court did, that Edison is a monopolist in control of an essential facility, it must not unreasonably deny access to the facility to its competitors. *MCI*, 708 F.2d at 1132. Given that predicate, we conclude that Edison had a duty to

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[10]The 18 month period versus three year period engendered confusion because Vernon's damage study was based on the 18 month notice period provided in Special Condition 12.

integrate purchases of outside resources upon reasonable notice. Despite the assumptions made in Vernon's damage study, Vernon's complaint is not that Edison refused to allow integration on 18 months' notice, but that Edison refused to allow integration until it felt like it. The IOA proposed by Edison did not contain a particular notice period — integration occurred at Edison's discretion.[11] The FERC determined that Edison's discretionary standard was unreasonable, and that a three year period was reasonable notice. *Southern Cal. Edison Co.*, 41 F.E.R.C. at 61,493-94; *Southern Cal. Edison Co.*, 52 F.E.R.C. at 62,202-03.[12]

Edison offered no legitimate business reason for its refusal to provide a reasonable notice period. Rather, in support of its motion for summary judgment, it simply asserted that it had no duty under the antitrust laws to provide integration on reasonable notice. We find little merit in that contention. In any event, it seems unlikely that Edison could have prevailed on a claim that it had a legitimate business reason for refusing to establish a reasonable notice period. The integration agreement provided benefits not only to the municipal utility, but to Edison as well. Edison would be able to avoid adding additional generating capacity and it also received a portion of the integrated electricity as reserves. The municipality would be able to lower its costs. Thus, in refusing to provide for a reasonable notice period, Edison was foregoing a benefit to itself and its ratepayers. *Cf. Aspen Skiing*, 472 U.S. at 608, 105 S.Ct. at 2860. A trier of fact might well conclude that Edison had no legitimate business reason for refusing to enter into a reasonable IOA.

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[11]As characterized by the FERC, the IOA would have permitted Edison to "subordinate a completed city project [desired to be integrated] to an Edison project that may still be in the early stages of development or which may be deferred or never completed." *Southern Cal. Edison Co.*, 41 F.E.R.C. at 61,494.

[12]The district court did not determine what notice requirement would be reasonable, but concluded that no liability could be imposed for refusal to adopt a notice period of less than three years. Vernon asserted before the FERC that a three year period was reasonable and the FERC agreed.

[5] In other words, based upon all of the assumptions that the district court made for summary judgment purposes, it is possible that a trier of fact would find that Edison's IOA position could have been an attempt to use monopoly power to eleminate competition. Had the determination of the district court been made at the end of a trial, there would not be error; summary judgment is another matter entirely.[13]

3. *Special Condition 12 Claim.*

[6] The district court found that Edison had no obligation under the antitrust laws to offer SC-12 to Vernon, particularly where Edison could reasonably require three years notice for integration of capacity resources. Even though Edison had a duty to integrate capacity resources on reasonable notice, there is nothing to suggest that Edison was required to do so through SC-12. In addition, it appears that there are no damages attributable to Edison's failure to implement SC-12 sooner which are separable from Edison's failure to provide for integration on reasonable terms. As Vernon contends that SC-12 was only a partial correction of the defects in the IOA, there would appear to be no additional losses from any delay or limitation in SC-12 over and above the losses allegedly caused by the improper IOA. Summary judgment on this claim was appropriate.

4. *Interruptible Transmission Service.*

The district court concluded that three grounds supported summary judgment on Vernon's claims that Edison improperly denied, interrupted or curtailed Interruptible Transmission Service (ITS) from Nevada Power to Vernon. First, the court concluded that Vernon had failed to quantify any damages from the interruptions.[14] Second, the court concluded that an antitrust claim could not be based on a contractual dispute as to the reasonableness of conduct." Finally, the court concluded that

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[13]However, see the damage discussion in Part C of this opinion.

[14]See our discussion of damages in Part C of this opinion.

Vernon had failed to demonstrate that Edison's reasons for interrupting transmission were not legitimate.

[7] We are not convinced that antitrust liability may not be predicated on conduct which also happens to create a contract dispute. It is certainly true that a claimed breach of contract by unreasonable conduct, standing alone, should not give rise to antitrust liability. But in this case, Vernon is not simply claiming that Edison breached its contract. Instead, Vernon is claiming that by preventing the purchase of electricity from Nevada Power, Edison acted anticompetitively and without a legitimate business reason. The fact that Vernon and Edison have a contract allowing Edison to interrupt transmission "for any reason" is beside the point. The contractual right to interrupt service does not grant Edison the freedom to act anticompetitively. *See California v. Chevron Corp.*, 872 F.2d 1410, 1414 (9th Cir. 1989) discussing pendent state law claims to antitrust case), *cert. denied*, 493 U.S. 1076, 110 S. Ct. 1126, 107 L. Ed. 2d 1032 (1990). *See also City of Long Beach v. Standard Oil*, 872 F.2d 1401 (9th Cir. 1989) (discussing antitrust claims in action related to *California v. Chevron*), *amended*, 886 F.2d 246, *cert. denied*, 493 U.S. 1076, 110 S. Ct. 1126, 107 L. Ed. 2d 1032 (1990). In short, Edison might avoid contractual liability through the interruption provision, although even that is questionable, *California v. Chevron Corp.*, 872 F.2d at 1414, but the contractual limitation does not speak to antitrust concerns.

That, however, does not itself demonstrate that summary judgment was inappropriate. At first blush, Vernon's evidence seems to raise an issue of fact as to whether Edison's asserted business justifications for interrupting transmission were legitimate. There was some evidence from which a trier of fact could conclude that Vernon encountered refusals to provide transmission even when Edison had capacity available.

Nonetheless, summary judgment was appropriate on this claim. It is not enough for a party to content itself once it has produced a mere scintilla of evidence to support its case. Rather, as the Supreme Court held in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986), the record must be sufficient to "lead a

rational trier of fact to find for the non-moving part . . ." That requirement was underscored in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986) where the Court held that the evidence must have sufficient strength to allow a reasonable jury to "return a verdict for the nonmoving party." Here the evidence does not reach that level.

Vernon's evidence consists of an entry in a Nevada Power log that indicates that on one occasion there was a refusal to allow transmission if Nevada Power was "purchasing [power] from the east," and a sworn statement and a deposition from a single former Nevada Power dispatcher, Richard Greenwalt.

[8] Greenwalt's testimony was to the effect that there was on occasion a refusal to allow transmission which prevented Nevada Power from making a sale to Vernon. He indicated that some possibly improper statements were made to him "reasonably often" or were "very common." His exact meaning is not clear. More than that, he gave absolutely no specifics as to person or as to time. Detail of a kind that would allow evaluation of the accuracy of his recall or of the consistency and extent of the acts is missing. Certainly, there was no evidence that transmission was interrupted at any time at the behest of any person employed by Edison other than a dispatcher, who was acting as he did for unknown reasons. There was no evidence that any person with management or supervisory authority ever told any dispatchers to interrupt or to refuse transmissions for any anticompetitive reason or that dispatchers were acting on a policy of wrongfully refusing or interrupting transmission. There was no evidence produced to show that any management level personnel ever approved or ratified wrongful transmission interruptions or refusals.

It is important to remember that this is not a simple tort case where a single incident is enough to support liability. The claim in this case is that there was relatively long-term activity aimed at crushing a competitor. If proved, antitrust liability and treble damages would be imposed upon Edison. Yet, Vernon proposed to proceed with this complex antitrust case based upon evidence which almost entirely consisted of statement from a former Nevada Power employee operating at a fairly low level. As

already mentioned, his statements were that unknown employees of Edison, operating at a similarly low level, interrupted transmission from time to time improperly. Who did it remains unknown. When they did it remains equally unknown. There is an almost total absence of detail. Against that Edison did all one could do: it submitted numerous affidavits from Nevada Power and Edison employees who stated that they never did those things or even heard of them. Their testimony, which was uncontested and unchallenged, indicates that if the threats did occur they were neither frequent no uniformly issued.

We agree with the district court that antitrust liability must be composed of stronger stuff. In so doing we do not mean to suggest that lower level employees cannot involve a corporation in antitrust liability. Nor do we suggest that credibility determinations should be made at the time of summary judgment.

As to the former, we recognize that even if an employee is violating express corporate policy, the corporation might still be held responsible. As long as the employee is acting within the scope of his employment, imposition of liability upon the corporation is appropriate. *See United States v. Portac, Inc.*, 869 F.2d 1288, 1293 (9th Cir. 1989), *cert denied*, ____ U.S. ____, 111 S. Ct. 129, 112 L. Ed. 2d 97 (1990); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125, 93 S. Ct. 938, 35 L. Ed. 2d 256 (1973). *See also American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982). Nevertheless, we do not believe that the employee's position within the organization can be entirely ignored when we are attempting to determine whether antitrust activity was afoot at all. For example, in each of the cases just cited a conspiracy to act for anticompetitive reasons was clearly present and the employee involved wielded a good deal of authority. In *Hilton Hotels* there was a full blown conspiracy and the employee in question was *the* purchasing agent for the hotel in question. 467 F.2d at 1004. In *Portac*, also, there clearly was a conspiracy and, again, the employee involved was the sole purchasing agent for the defendant. 869 F.2d at 1293. Finally, in *American Society of Mechanical Engineers* there was a clear conspiracy to violate the antitrust

laws. One of the participants was the chairman of the subcommittee that issued a letter designed to carry out the anticompetitive intentions. 456 U.S. at 560-62, 102 S. Ct. at 1939-40. The letter was then signed by the secretary of the committee itself, and carried great weight in the engineering industry. *Id.* at 561-64, 102 S. Ct. at 1940-41. In the case at hand, however, the most Vernon has shown is that one or more unidentified members of an amorphous group of Edison dispatchers occasionally unnecessarily interrupted power transmissions for largely unexplained reasons, some of which may have been improper. They did so while pursuing a myriad of transactions conducted over a long period.

Nor need we or should we evaluate credibility at summary judgment. *See McLaughlin v. Liu,* 849 F.2d 1205, 1207 (9th Cir. 1988). Nevertheless, the testimony of Mr. Greenwalt, even if accepted, would not be sufficient to allow a rational trier of fact to impose antitrust liability on Edison. The question here is not simply whether Edison can be held liable for the proven antitrust violations of employees acting with apparent authority, *see Hilton Hotels,* 467 F.2d at 1004 and *Portac,* 869 F.2d at 1293, but whether a rational jury could conclude that there were antitrust violations in the first place. In evaluating that question, the fact that Mr. Greenwalt could not recall any names, dates or times further indicates that Vernon has not raised a factual dispute sufficient to survive summary judgment.

In sum, more evidence that that produced by Vernon would be needed to impose liability upon Edison on this claim. The district court did not err when it granted summary judgment.

5. *The Pacific Intertie.*

[9] Vernon asserted that Edison violated § 1 by conspiring with others to prevent Vernon from obtaining access to the Pacific Intertie.[15] We recognize that in Vernon's § 1 claim with respect to the Pacific Intertie, Edison, no Vernon, would have the burden of

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[15]While Edison contends that Vernon abandoned its Pacific Intertie claims, it is clear from the record that Vernon did not do so. We find no error in the district court's entry of judgment on this claim without a

proving that it had a legitimate business purpose for foreclosing access. *Image Technical*, 903 F.2d at 618 n.5. However, a review of the record does not reveal *any* evidence adduced by Vernon that Edison conspired with anyone to deny access to the Pacific Intertie. A § 1 violation requires "concerted action" by more than one entity. *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988).[16] The district court properly granted judgment on this claim.

B. *Edison-Nevada Power Boycott Claims.*

To prevail on a claim under § 1, Vernon would have been required to show concerted action on the part of Edison and Nevada Power. *The Jeaney*, 849 F.2d at 1152. The district court granted summary judgment on the horizontal boycott claims on the grounds that Vernon had failed to show evidence of damages from the alleged boycott and because Vernon had failed to offer evidence of concerted action.

We agree with Vernon that a conspiracy to monopolize may exist even where one of the conspirators participates involuntarily or under coercion. *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 682 (9th Cir.), *cert. denied*, 429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976). To survive summary judgment, a plaintiff must point to evidence " 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (citation omitted); *Morgan, Strand*, 924 F.2d at 1488. Edison makes much of this language and suggests that Vernon's evidence does not exclude the possibility of independent action. But *Matsushita* does not extend quite as far as Edison suggests. Following its "exclude the possibility" language, the Court stated that the

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formal motion for summary judgment, since Vernon acceded to the entry of judgment on this claim.

[16]Vernon also conceded that it had not segregated damages on the Pacific Intertie claims. See our discussion of damages in Part C of this opinion.

nonmoving party, "in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed" it. *Id.*, 475 U.S. at 588, 106 S. Ct. at 1356-57. Nevertheless, Vernon did not even meet this somewhat lesser standard.

[10] Here, too, Vernon's evidence was far too weak. First, there is no evidence that the alleged acts by the unnamed Edison dispatchers were more than random, unauthorized acts by employees. There was no showing, in other words, that these Edison dispatchers entered into conspiracies with Nevada Power dispatchers to boycott Vernon's attempt to purchase power. Second, if Edison refused to transmit Nevada Power's electricity over Edison lines, Nevada Power had no choice but to acquiesce. That does not make it a conspirator. Third, as the district court noted, it would be most difficult to draw a reasonable inference of conspiracy where there was no meeting of the minds. Instead, according to Vernon's evidence, Edison had to continually threaten Nevada Power dispatchers and they did not necessarily accede to those threats. The district court did not err.

C. *Damages.*

Vernon presented the court with a damage study which was, at best, seriously flawed. That resulted in findings that because no damages had been properly shown, there was an independent reason to grant summary judgment on various claims against Edison. Vernon asserts that the district court erred. We do not agree. Indeed, the deficiencies in that study undermine Vernon's whole case.

The principles which the courts follow in deciding this issue are well described in *MCI*. There the court reviewed a damage verdict and in so doing made the following observations:

> Once *causation* of damages has been established, the *amount* of damages may be determined by a just and reasonable estimate as long at the jury verdict is not the product of speculation or guess work. Since the Supreme Court has been willing to accept a degree of uncertainty in the calculation of damages, strict proof of what damages

> have been caused by which acts has not been required. Not requiring strict disaggregation of damages among the various unlawful acts of the defendant serves to prevent a defendant from profiting from his own wrongdoing and makes sense when damages arise from a series of unalwful acts interwined with one another.
>
> . . . .
>
> The courts have always distinguished between proof of *causation* of damages and proof of the *amount* of damages. Thus, the courts have been consistent in requiring plaintiffs to prove in a reasonable manner the link between the injury suffered and the *illegal* practices of the defendant.

708 F.2d at 1161 (citations omitted).

The court continued as follows at page 1163:

> There is nothing inconsistent between requiring *proof that damages were caused by illegal acts* and the rule that a plaintiff need not disaggregate damages among those acts found to be unlawful. In this case, the trial court granted summary judgment for AT & T on seven of the twenty-two counts in the complaint. In addition, the jury found for AT & T on five of the fifteen counts it considered. The jury found for MCI on two counts relating to Hi-Lo tariffs, two counts relating to the tariffs filed with state agencies, and six counts relating to interconnection. In addition, this court has now determined that the jury's findings for MCI on the pricing and pre-announcement of Hi-Lo as well as the finding relating to denial of multipoint interconnections must be set aside.
>
> MCI assumed in the preparation of its damage study that all twenty-two of AT & T's acts charged were illegal. In fact, liability has now been established with respect to only seven of the twenty-two counts of alleged monopolization. MCI's lost profits study does not establish any variation in the outcome depending on which acts of AT & T were held to be legal and which illegal.

The result was a remand for a new trial on the damage issue. We accepted that view in *Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1352 (9th Cir. 1985) (footnote omitted), where we, too, declared that the plaintiff's "utter failure to make any segregation between damages attributable to lawful competition and that attributable to the unlawful scheme to deviate from the tariff rate requires reversal of the verdict and remand for a new trial on the amount of damages." *Cf. William Inglis & Sons Baking Co. v. Continental Baking Co., Inc.*, 942 F.2d 1332, 1341 (9th Cir. 1991) (where lost profits calculation was wholly speculative, the district court should have granted judgment notwithstanding the verdict).

Here, of course, the matter came up before trial commenced and at a time when the only possibly admissible damage study was before the court. That study failed to segregate the losses, if any, caused by acts which were not antitrust violations from those that were. Nor did Vernon attempt or offer to make corrections. Rather, according to its own expert Stephen Flanagan, speaking in the context of the group boycott claim, Vernon would not or could not do so. That might well have been because Vernon's deeply flawed study is the handmaiden of its equally flawed theory that it should have proportionate firm access to Edison's whole system at all times.

The question remaining is whether the district court was nevertheless required to allow Vernon to go to the jury with its erroneous approach or to give it still another opportunity to refine a study that, according to Vernon, could not be refined. We think not.

We dealt with a similar situation in *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988). There the damage studies of the plaintiffs were plainly insufficient, so the district court excluded them. We held that the absence of a proper study meant that the plaintiffs "could make no showing about the amount of damages." *Id.* at 808. As a result, there was no "competent evidence from which a jury could fairly estimate damages," *id.* at 808, and summary judgment was proper. *See also ILC Peripherals Leasing Corp. v. International Business Mach. Corp.*, 458 F. Supp. 423, 434 (N.D. Cal. 1978) (summary judgment granted

where the damage study did not separate effects of various acts so that "there was no basis in the record for the jury to determine what the effect on damages would be if it found one or more of the challenged acts lawful.")

In *McGlinchy*, we cited our earlier case of *Dolphin Tours Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506 (9th Cir. 1985), a case in which the damage study presented at the time of summary judgment was also flawed. There, however, the flaws did not appear to be insurmountable and we opined that "Dolphin has presented evidence from which a jury could reasonably estimate the amount of Dolphin's injury without speculation if Dolphin's damage evidence were filled in by testimony at trial." *Id.* at 1513. We had confidence in that possibility because it appeared that the date already existed even though it had not yet been placed in the proposed damage report. Moreover, we said, if the repair was not made the district court could grant a directed verdict or a judgment notwithstanding the verdict.

Here we have no such confidence. Vernon insists that all of Edison's acts contributed to the damage figure, but the district court and we have already found that many of those acts were proper. It might be argued that since Vernon had a contract with Nevada Power which was to save Vernon $80,000 per month and did not, there was at least a loss of that amount, damage studies notwithstanding. However, that argument would suffer from the same flaw because there is no indication of what part of that $80,000 loss of savings was due to proper interruptions of service and what part to improper ones, or for that matter, due to other factors entirely.

[11] In short, we agree with the district court that the serious flaws in the only damage study which could be profferred to the jury placed Vernon in the position of having no proper proof of damages at all. Thus, the district court did not err when it awarded summary judgment based upon this lack of evidence.

D. *Injunctive Relief.*

[12] Injunctive relief might be appropriate if Edison has unreasonably refused access to its essential facilities. *Otter Tail*

Power Co., 410 U.S. at 381-82, 93 S. Ct. at 1031-32. The court did not grant any injunctive relief because it concluded that Edison had not violated the antitrust laws. However, summary judgment on Vernon's claim that Edison's refusal to provide for a reasonable notice term in the IOA was proper only because Vernon failed to quantify damages which resulted from that conduct. Thus, it is possible that Vernon will be entitled to injunctive relief if it can prove an antitrust violation. We therefore must reverse the denial of injunctive relief as to the IOA claim only and remand the case to the district court to determine the propriety of injunctive relief.

CONCLUSION

Here, as in *City of Anaheim*, slip op. 1221, we need only decide whether the actions of Edison violated the antitrust laws. The district judge held that Edison did not violate those laws, and, even if it did, Vernon did not properly delineate damages. For the most part we agree.

Therefore, we affirm the district court in every respect save one. That one is: the district court erred in granting summary judgment on Vernon's claim for injunctive relief arising out of Edison's refusal to develop reasonable terms for integrated operations agreements.[17]

AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. The parties shall bear their own costs on appeal.

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[17]We deny Edison's motion ot strike portions of Vernon's brief and excerpts.

Filed April 21, 1992
Cathy Caterson, Clerk, U.S. Court of Appeals

No. 90-56281

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF VERNON,
Plaintiff-Appellant,
v.
SO. CALIFORNIA EDISON COMPANY
Defendant-Appellant,

ORDER

Before: SCHROEDER, LEAVY, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the suggestion for rehearing en banc are accordingly DENIED.

CASE NO. CV 83-8137 MRP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CITY OF VERNON, CALIFORNIA
Plaintiff,
v.
SOUTHERN CALIFORNIA EDISON COMPANY,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER GRANTING EDISON'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FORECLOSURE CLAIMS

Having read and considered the papers and evidence submitted in connection with defendant Southern California Edison Company's ("Edison's") Motion for Summary Judgment on plaintiff's foreclosure damage claims, associated motions of defendant Edison and plaintiff the City of Vernon ("Vernon") and the pleadings filed herein, and having heard oral argument with respect to the proposed findings and conclusions and objections thereto, the Court finds and concludes as follows:

A.

FINDINGS OF FACT

1. INTRODUCTION

1.1 Plaintiff Vernon's First Amended and Supplemental Complaint in this action alleged, *inter alia*, that Edison violated §§ 1 and 2 of the Sherman Act through a pattern of conduct commencing in 1961 and continuing into the present. Vernon's contentions fall into three basic categories: (1) those relating to the terms and conditions of Vernon's access to Edison's transmission lines and access to non-Edison sources of power (the "foreclosure" claims); (2) those concerning Edison's rates; and (3) those asserting a conspiracy between Edison and the Nevada Power Company to boycott Vernon.

1.2 Edison has filed motions for partial summary judgment on Vernon's § 2 rate and § 1 group boycott claims, and for summary judgment on Vernon's foreclosure claims.

1.3 By its Order dated March 1, 1990 and "Memorandum of Decision Granting Motions for Summary Judgment with Respect to Rate Claims and Group Boycott Claims" filed March 7, 1990 (the "Memorandum of Decision"), the Court granted Edison's motions for partial summary judgment on the plaintiff's rate and boycott claims.

1.4 These Findings of Fact and Conclusions of Law are made in connection with the Court's Order dated March 1, 1990 granting Edison's Motion for Summary Judgment on Plaintiff's Foreclosure Damage Claims.

2. FACTUAL BACKGROUND

(a) *Southern California Edison Company*

2.1 Defendant Edison is an investor-owned utility that provides electric service in central and southern California, within a service territory established by the California Public Utilities Commission ("CPUC").

2.2 Edison, as a fully integrated electric utility, generates, transmits, and distributes electricity.

2.3 Edison provides electric service to residential, commercial, and industrial customers located throughout its service territory.

2.4 Edison also purchases electricity from and sells electricity to other utilities located outside its service territory.

2.5 Edison operates its own electric "control area." A "control area" can be viewed as an area or system within which the operation of all generation, transmission and distribution facilities must be coordinated so that the system is operated as a synchronized integrated whole, at the same frequency, and in a reliable fashion. Typically every major utility operates a control area.

(b) *Vernon and the Other Resale Cities*

2.6 Plaintiff is a California municipality that owns its own distribution system and provides electric service at retail within its boundaries. While Vernon has some generating capacity, most of the power it sells is acquired through wholesale purchases from Edison or other bulk power suppliers.

2.7 Vernon occupies an area of approximately 5.06 square miles and is located within Edison's service territory. Vernon has common boundaries with the City of Los Angeles, the service territory of the Los Angeles Department of Water and Power ("LADWP") and other cities in Los Angeles County that are also within Edison's service territory. Vernon is primarily an industrial city.

2.8 In addition to Vernon, Edison's "wholesale" or "resale" customers include the cities of Anaheim, Azusa, Banning, Colton, and Riverside (the "Cities"). Because they purchase from Edison wholesale electricity that they resell to their retail customers, Vernon and the Cities are sometimes referred to as "Resale Cities." Like Vernon, the Cities are located within Edison's service territory and each own their own distribution systems and provide electric service at retail within their boundaries. Because Vernon and the Cities do not operate their own control areas and are within Edison's control area, Edison has the ultimate responsibility for meeting their system load requirements.

2.9 From 1962 to 1977, Vernon purchased all of its electricity that it resold to its resale customers from Edison pursuant to an operating agreement entered into by the parties. Since 1977, Vernon has been a partial requirements customer of Edison.

2.10 Vernon and Edison entered into a limited Integrated Operations Agreement ("IOA") restricted to Vernon's participation in the Palo Verde Nuclear Generating Station located in Arizona. Vernon has an ownership interest in this generation facility and has participated through the Southern California Public Power Authority, in which it is a member. The Edison-Vernon Palo Verde IOA is Exhibit P to the O'Malley Opposition Declaration.

(c) *Edison's Transmission Network*

2.11 Edison's transmission lines are a part of an interconnected series of transmission lines connecting Edison with other utilities located throughout the western United States. Edison's Extra High Voltage ("EHV") transmission lines (generally operated at 500 kV or above) are used for the transmission of large blocks of power from remote generation resources, including those of other utilities, to the main grid of Edison's transmission system which is operated at 220 or 230 kilovolts or "kV" (the "220 kV network").

2.12 One group of EHV transmission lines in which Edison has rights is the Pacific Intertie. The Pacific Intertie consists of two 500 kV alternating current ("AC") lines running from Oregon through California (the "AC lines") and one 800 kV direct current ("DC") line running from Oregon through Nevada into Southern California (the "DC line").

2.13 Edison's EHV transmission lines to the Southwest consist principally of 500 kV AC lines from the Los Angeles basin to Nevada, Palo Verde (in Arizona) and the Four Corners area (in New Mexico). Other EHV transmission lines to the Southwest are owned by LADWP, San Diego Gas & Electric Company and the Southern California Public Power Authority.

2.14 Edison's 220-kV network, which consists of a grid or network of 220 or 230 kV transmission lines, is situated in the greater Los Angeles metropolitan area. Edison's 220 kV network connects with a number of major utilities, including LADWP and the California Department of Water Resources ("CDWR").

(d) *Regulation*

2.15 The terms and conditions of Edison's rates and service to its retail customers are regulated by the CPUC. The CPUC also has jurisdiction over Edison in that Edison cannot dispose of its assets or rights which are used or useful for service to retail customers without CPUC approval.

2.16 Edison's rates and terms of service to its resale customers are regulated by the FERC. Any agreements between Edison

and its Resale Cities, including Vernon, regarding resale service or transmission must be filed with the FERC. Edison cannot legally charge a rate or provide a service to a Resale City without an appropriate FERC rate schedule for that rate or service being in effect.

2.17 In 1972, in part as a result of certain antitrust claims brought by the Cities, Edison and each of the Resale Cities entered into settlement agreements. Those agreements, in addition to releasing Edison from antitrust liability for conduct prior to that time, contemplated a framework within which the Resale Cities could begin to acquire energy from other sources and integrate it into the Edison system.

2.18 Integration is a contractual concept under which resources and loads of independent parties are planned and operated as if they were a single system.

2.19 The integration of resources into Edison's system, as opposed to the mere transmission of such energy by Edison is important because of Edison's rate structure. If Edison integrates a proposed resource, Edison gives the customer credit not only for the energy brought into the system, but also a "capacity credit" for the reduction in generating capacity Edison must maintain.

2.20 Anaheim and Riverside, after five years of negotiations, entered into IOAs with Edison to establish standards for the integration and transmission of resources. These IOAs became part of Edison's rate schedules in 1979.

2.21 Vernon did not seek to participate in the negotiations for IOAs that took place in the 1970s.

2.22 Azusa, Banning and Colton entered into IOAs similar to those entered into by Anaheim and Riverside. These IOAs became part of Edison's rate schedules in 1981.

2.23 Since 1981, Edison has offered to enter into an IOA with Vernon similar to the IOAs with the five Cities. Vernon, however, has refused to enter into such a "generic" IOA.

2.24 Under the 1972 Settlement Agreements, and the Cities' generic IOAs, Edison must provide the Resale Cities with all of

their requirements for electricity to the extent the Resale Cities are unable to obtain power from others or from their own facilities. The IOAs have allowed the Resale Cities to build their own generation projects, to participate in joint projects with others, and to purchase capacity from others.

2.25 Edison's standard for the timing of capacity credit in the generic IOAs, § 8.1.2.3 of the IOAs, past applications of that standard, as well as other terms of the IOAs were challenged in FERC Docket No. ER81-177. Although the decision in that Docket is still subject to rehearing, the FERC concluded that the standard set forth in § 8.1.2.3 of the generic IOAs was not just and reasonable because it allowed Edison to discriminate unduly in determining when a wholesale customer should begin receiving capacity credits for a noticed resource. The FERC concluded that a three-year notice requirement for partial requirements customers who intend to acquire and integrate a capacity resource was reasonable. In that FERC Docket, Vernon proposed and supported the position that a three-year notice requirement should be adopted for the integration of a capacity resource. Docket No. ER 81-177, 27 FERC ¶ 63.053 at 65,205, incorporated by the FERC in its decision (41 FERC ¶ 61,188 at 61,496). In addition, the FERC found other terms in the generic IOA to be unreasonable.

2.26 In this action, Vernon does not contend that a three-year notice requirement for the integration of capacity is unreasonable.

(e) *Special Condition 12*

2.27 In addition to the IOAs, Special Condition 12 allows the Resale Cities, in certain circumstances, to import and receive credit for capacity obtained from sources other than Edison without "integration" of the resource pursuant to the IOA.

2.28 Special Condition 12 arose, in part, out of an agreement between Edison and Vernon regarding the operation of diesel generators owned by Vernon. In July 1982, Edison and Vernon entered into an agreement under which Edison committed to file a tariff with the FERC which would provide Vernon with an

opportunity to operate generation projects within the City of Vernon, including Vernon's diesel generators.

2.29 Special Condition 12 was included within a proposed resale rate schedule filed by Edison with the FERC in October 1983. Under the terms of the July 1982 settlement, Vernon's diesel generators could be used by Vernon when they were available for capacity and associated energy. Under Special Condition 12, additional capacity and associated energy could be generated or imported by Vernon by giving certain notices to Edison, with the first notice due on or before July 1, 1985, for generation or imports commencing during the two-year period January 1, 1987 through December 31, 1988.

2.30 There is no provision for penalties if a resource noticed by a Resale City under Special Condition 12 is not contracted for or actually received by that City and no limit on the amount of a City's load that must be met by Special Condition 12 resources.

2.31 In June 1985, Vernon noticed approximately 27 MW of Special Condition 12 resources from outside the City boundaries, with credit to commence on January 1, 1987. Prior to January 1, 1987, Vernon requested, and Edison agreed (although not obligated to do so under Special Condition 12) that a purchase from CDWR could substitute for the 27 MW of resources from other utilities which Vernon had noticed. Edison provided Vernon firm transmission service on Edison's 220 kV network for the 27 MW of Special Condition 12 resources from CDWR.

2.32 In June 1987, Vernon gave notice for all of the Special Condition 12 resources that it felt it could handle for the period of January 1, 1989 through December 31, 1990. That included 98 MW of capacity and associated energy during the summer and 62 MW of capacity and associated energy during the winter from CDWR. Prior to the start of delivery of resources on January 1, 1989, Edison again permitted Vernon to substitute for certain Special Condition 12 resources previously noticed.

2.33 Vernon has used Special Condition 12 to reduce its dependence on Edison for its capacity and energy needs.

(f) *Interruptible Transmission Service*

2.34 On or about December 15, 1981, Nevada Power Company ("NPC") and Vernon entered into an Interconnection Agreement providing, in part, for the sale of non-firm energy by NPC to Vernon.

2.35 On or about January 5, 1982, Vernon and Edison entered into an agreement for the integration and interruptible transmission service for non-firm energy purchased by Vernon from NPC. The agreement was filed with the FERC and became part of Edison's rate schedules as of February 1, 1982.

2.36 During 1982 and 1983, Vernon imported significant quantities of non-firm energy from NPC under these arrangements.

2.37 On or about December 23, 1983, Edison and Vernon executed an agreement for the integration of, and interruptible transmission service for, non-firm energy purchased by Vernon from the CDWR.

2.38 The NPC and CDWR interruptible transmission service ("ITS") Agreement provided in part that the availability of transmission service "shall be determined at the sole discretion of Edison," and Edison reserved the right to interrupt or curtail such service "at any time and for any reason." Edison has entered into ITS agreements with the other Resale Cities that provide ITS on all of Edison's transmission lines. These agreements also provide for interruption "at any time and for any reason."

2.39 The form of interruptible transmission service contracts offered by LADWP include a provision that allows LADWP to interrupt or curtail such service "at any time and for any reason." One of Vernon's consultants, Mr. Brodie, admitted that interruptions of ITS for minimum load are not unusual in the industry and that the owner of transmission facilities is expected to have a priority of use of those facilities.

2.40 Although Edison's ITS contracts with Vernon and its other Resale Cities allow Edison to interrupt or curtail such transmission service "at any time and for any reason," Vernon has not presented any evidence that when Edison did interrupt

Vernon's transmission, that Edison did so for anticompetitive reasons.

(g) Vernon's bulk power resources

2.41 In 1983, Vernon bought nearly all of its electricity from Edison. By 1987, Vernon was purchasing less than one half of its power from Edison.

2.42 As of 1989, Vernon's non-Edison resources included the following: (1) a diesel plant with peaking capacity of approximately 21.5 MW; (2) entitlements of an average of approximately 71 MW of peaking power and associated energy from Hoover Dam; (3) a 10.6 MW interest in the Palo Verde Nuclear Generation Station; and (4) two gas turbines with a total peaking capacity of 11.2 MW. Vernon also purchases approximately 98 MW during the summer and 62 MW during the winter of capacity and associated energy from the CDWR, and 30 MW of capacity and associated energy from LADWP. In total, Vernon currently has capacity from non-Edison resources of approximately 180 MW during the summer and 145 MW during the winter.

2.43 Vernon's electric requirements at its peak are approximately 195 MW, so during the summer months, Vernon has its own non-Edison resources to obtain over 92% of its capacity.

2.44 In addition, Vernon is able to purchase economy energy during off-peak hours from non-Edison sources at the rate of approximately 70 MW.

2.45 Vernon operates its diesels, its Hoover power, CDWR, and LADWP purchases, and the gas turbines, pursuant to Edison's Special Condition 12; Vernon's Palo Verde ownership interest is integrated pursuant to the Edison-Vernon Palo Verde IOA.

2.46 Vernon is increasing its outside resources even beyond what it had as of 1989.

3. VERNON'S FORECLOSURE DAMAGE CLAIMS

3.1 In support of its foreclosure claims, Vernon alleges that Edison unlawfully restrained Vernon from purchasing bulk power from suppliers other than Edison by denying Vernon access to its transmission lines. Specifically, Vernon contends that Edison should have given the City additional transmission over the Pacific Intertie and over certain other EHV lines extending to the Southwest, as well as unconstrained transmission over Edison's 220 kV network for Vernon's purchases from CDWR. Vernon further alleges that as a result of this foreclosure, as set out in Claims I and II of Vernon's First Amended Complaint, the City was forced to purchase wholesale power from Edison at prices higher than it would otherwise have had to pay. Vernon claims that it was thus unable to compete with Edison in the provision of retail electric service.

3.2 Vernon calculates its damages resulting from the foreclosure as the difference between the rate Edison charged Vernon and that which Vernon alleges it could have paid if Edison had "foreclosed" Vernon's access to the transmission lines.

3.3 Mr. Whitfield A. Russell, an engineer testifying on behalf of Vernon, quantified these overcharge claims in five alternative damage scenarios. Pursuant to the procedural schedule established by the Court, Exhibit 2867 is the final version of Vernon's damage study and is the only one which could have been presented by Vernon at trial.

3.4 Vernon's damage study prepared by Mr. Russell includes three principal damage scenarios, *i.e.*, the Special Condition 12 capacity claims, the IOA capacity claims, and the energy-only claim. The two capacity claim scenarios each offer an alternative formulation, so that there are a total of five different damage models in the Vernon study.

3.5 These alternative calculations, according to Vernon's witness, produce damages ranging from a low of $14,969,341 under the so called "Energy-Only" calculation to a high of $59,574,440 under the base case "Capacity Damage" calculation. Damages are calculated for the years 1982 through 1987.

3.6 All five of the damage scenarios presented by Vernon assume that Edison is obligated to provide Vernon with a relative size share access to Edison's EHV transmission lines, and unconstrained access to Edison's 220 kV network. The relative size share access calculated by Mr. Russell is based upon the ratio of Vernon's load divided by Edison's total load, including the load of Vernon.

3.7 Under both of Vernon's IOA capacity damage scenarios, Vernon is assumed to be able to import new and additional capacity and energy into the Edison control area, and receive credit for capacity purchases, pursuant to the provisions of a hypothetical IOA, upon 18-months notice to Edison of the proposed additional capacity transactions.

3.8 Although Edison first made Special Condition 12 available to Vernon in June 1984, such that resources noticed pursuant to this provision could be imported to offset demand charges beginning in January 1987, Vernon's Special Condition 12 capacity damage scenarios assume that this provision would have been available for purposes of offsetting Vernon's demand charge by 1983 rather than 1987.

3.9 In summary, the only conduct of Edison from which Vernon claims quantifiable damages consists of: (1) the failure of Edison to provide Vernon with relative size share access to its EHV transmission lines and unconstrained access to its 220 kV network; (2) the failure of Edison to provide Vernon with an Integrated Operations Agreement containing terms acceptable to Vernon, including a provision requiring Edison to accept into its control area, and provide capacity credit for capacity imported on 18-months advance notice; and (3) the failure of Edison to have Special Condition 12 included in its FERC resale rate schedules four years earlier than this rate provision was included in Edison's FERC rate schedules.

3.10 Vernon's damage study does not segregate damages as to alleged foreclosure from any particular transmission line.

3.11 Vernon has also argued that Edison improperly interrupted transmission service provided to Vernon for purchases of non-firm energy from NPC and CDWR pursuant to the inter-

ruptible transmission service agreements between Vernon and Edison. Vernon has not, however, quantified any damages specifically arising from this alleged conduct.

3.12 Vernon's "relative size share" claim is premised on the argument that Vernon is entitled to direct relative size share access to Edison's EHV transmission lines, including Edison's entitlement on the Pacific Intertie and its transmission facilities linking Edison with the desert Southwest. The relative size share entitlement postulated by Vernon would give the City firm transmission service over Edison's EHV lines in an amount determined by first calculating Vernon's load as a proportion of Edison's total load and then multiplying this percentage figure by the megawatt capacity of the particular transmission lines. Vernon claims that Edison was obligated under the antitrust laws to offer this type of access even in the absence of a specific request by the City and even if Edison is unaware that access was desired.

3.13 The Court finds that Vernon has never made a formal request to Edison for relative size share firm transmission access.

3.14 In addition to this direct relative size share access, Vernon contends that it is entitled to unlimited access to Edison's 220 kV network provided there is sufficient capacity to meet the total demand, and if the grid is unable to handle all the demand, that the constraint on the system should be shared.

3.15 Edison admits that it has not given Vernon direct relative size share access to its transmission lines as assumed in Vernon's damage study.

3.16 If Edison granted Vernon relative size share access when Edison was fully utilizing its transmission lines to import low cost power, the result would be to shift the benefit of the low cost power to Vernon and away from Edison's other customers.

3.17 Exhibits A, B and C attached by Vernon to its "Double Dip" Motion demonstrate the shifting of benefits that would occur had Edison acceded to a Vernon demand for greater access to Edison's transmission lines.

3.18 Exhibit C is a specific example of how the type of access assumed by Vernon in its damage claims would discriminate in

Vernon's favor and against Edison's retail customers. Page 1 of that exhibit shows that the wholesale customer shares equally and proportionately in the benefits of Edison's low-cost imported energy. Pages 2 and 3 of that exhibit reveal how providing a 10% relative size share access, with the remainder purchased pursuant to an average cost-based wholesale rate, would discriminate in favor of the wholesale customers and against the retail customers. As can be seen on page 3, as a result of the "double dip,"[1] the energy costs of the wholesale customer are decreased, with additional costs imposed on the retail customers. This disproportionate access would result in the wholesale customer obtaining a higher percentage of its requirements from the low-cost power, while the retail customers would receive a lower percentage of their requirements from the same source.

3.19 To the extent the foregoing Findings of Fact are also Conclusions of Law, they are to be construed as Conclusions of Law as well.

B.

CONCLUSIONS OF LAW

4. STANDARDS FOR GRANTING SUMMARY JUDGMENT

4.1 Summary judgment is a useful tool for narrowing the issues to be tried in antitrust proceedings. *See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986); *Richards v. Nielsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987); *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 707 F. Supp. 1170, 1173-74 *("Universal Analytics")*.

4.2 Summary judgment is appropriate in an antitrust case involving a regulated electric utility. *See City of Mt. Pleasant, Iowa v. Associated Electric Coop, Inc.*, 838 F.2d 268, 273 (8th Cir. 1988) (the court expressly declined to accept the plaintiff's

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[1]That is, access to low-cost energy both from direct transmission use and indirectly through Edison's resale rates.

contention that "a different, heightened standard for summary judgment applies in complex antitrust cases.").

4.3 A moving party is entitled to summary judgment when "there is no genuine issue as to any material fact" and the movant "is entitled to a judgment as a matter of law." *See* Fed. R. Civ. Proc. 56(c). Under the *Celotex* Court's interpretation of this rule, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, supra,* 477 U.S. at 322.

4.4 The Court concludes that there is no genuine issue as to any material fact, and that Edison's Foreclosure Motion can be decided as a matter of law. The Court further notes that Vernon appears to agree with Edison that in this case, the sufficiency of Edison's proffered business justification is a matter of law and is thus appropriate for resolution pursuant to Edison's Foreclosure Motion. Vernon explicitly states that "Edison's asserted business reasons for denying access to Vernon are insufficient as a matter of law." *Vernon's Statement of Genuine Issues,*[2] *Issue No. 4, at 3. See, id., Issue Nos. 5, 12-13, at 3-4.* Moreover, Vernon failed to submit any facts sufficient to controvert or raise a factual dispute underlying the issue of legitimate business justification. *See, e.g., Vernon's Opposition Memorandum at 22-27.*

5. ELEMENTS OF A § 2 CLAIM FOR MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION

5.1 To prove the offense of monopolization under § 2, Vernon must show that (1) Edison possesses monopoly power in a relevant market, (2) Edison willfully acquired or maintained that power, and (3) Vernon suffered causal antitrust injury. *Oahu Gas Service, Inc. v. Pacific Resources, Inc.,* 838 F.2d 360, 363 (9th

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[2]"Vernon's Statement of Genuine Issues" refers to Vernon's Statement of Genuine Issues of Fact Submitted in Opposition to Edison's Foreclosure Motion.

Cir.), *cert. denied*, 109 S. Ct. 180 (1988) ("*Oahu Gas Service*"), *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986).

5.2 To prevail on a claim of attempted monopolization under § 2, Vernon must demonstrate that (1) Edison had the specific intent to control prices or destroy competition; (2) Edison engaged in predatory or anticompetitive conduct directed towards accomplishing that unlawful purpose; (3) there was a dangerous probability that Edison would succeed in its endeavors; and (4) Vernon suffered causal antitrust injury. *See California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 736 (9th Cir. 1979).

5.3 To show that Vernon's claims constitute § 2 violations under either theory, Vernon must show that these claims constitute anticompetitive conduct that caused antitrust injury to Vernon.

5.4 In its Foreclosure Motion, Edison assumed, solely for the purposes of the Foreclosure Motion, that there was competition between Edison and Vernon, that Edison had monopoly power in a properly defined market, and that Edison's transmission lines are essential facilities. For the purpose of ruling on this Foreclosure Motion, the Court also makes these assumptions, and makes no findings and has reached no conclusions on the issues of competition, monopoly power, or essential facilities.

5.5 In regard to the issue of whether Edison's transmission lines are essential facilities, the Court finds that there are factual questions on this issue, and that such factual questions required the denial of Vernon's Motion for Partial Summary Judgment on the Essential Facilities Claim (Vernon's "Essential Facilities Motion"). The Court notes, however, that credible arguments can be made that Edison's transmission facilities are not essential facilities within the meaning of the antitrust laws.

5.6 With respect to the issue of franchise competition, the Court finds that there are factual questions and that such factual questions required the denial of Vernon's Motion for Partial Summary Judgment on the Franchise Competition Claims (Vernon's "Franchise Competition Motion").

6. ANTITRUST OBLIGATIONS IMPOSED UPON A COMPANY WITH MONOPOLY POWER

6.1 There is no general unqualified duty for a firm possessing monopoly power to cooperate with its business rivals. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600.

6.2 A monopolist has no duty to reduce its prices in order to help consumers, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), or any obligation to extend a helping hand to new market entrants or to help its competitors survive or expand their businesses, *California Computer Products, Inc. v. IBM, supra*, 613 F.2d at 744.

6.3 As the Ninth Circuit has recently acknowledged:

> [I]t is consistent neither with *Berkey Photo* nor with the body of antitrust law as a whole to say that a holder of lawful monopoly power must passively concede every time someone else demands the right to do some portion of what that firm does, regardless of whether the services at issue are performed within the scope of the lawfully acquired monopoly and regardless of whether the 'monopolist' is merely conducting itself in a way that any other (non-monopolist) firm would under the circumstances.

Catlin v. Washington Energy Co., 792 F.2d at 1347, quoting *Grason Electric Co. v. Sacramento Mun. Utility Dist.*, 571 F. Supp. 1504, 1517 n.17 (E.D. Cal. 1983).

6.4 There are certain occasions, however, when a court will impose affirmative obligations on a monopolist. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. at 601. Where the monopolist's competitor is the monopolist's customer as well, the antitrust laws may impose duties on the monopolist to ensure that the monopolist's conduct does not unjustifiably impair its customer's ability to compete. *See Olympia Equipment Leasing*, 797 F.2d at 376; *Oahu Gas Serv.*, 838 F.2d at 368.

6.5 Although affirmative duties are imposed on a monopolist, "[t]hese duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor." *Oahu*

Gas Service, supra, 838 F.2d at 368; *Aspen Skiing, supra,* 472 U.S. at 604-05. Thus, even if the monopolist has affirmative duties to its competitors, if the monopolist had a legitimate business justification for its conduct, the plaintiff cannot prevail on its claim of a violation of § 2. *See, e.g., Oahu Gas Service, supra,* 838 F.2d at 368; *Image Technical Service, Inc. v. Eastman Kodak Co.,* 90 Daily Journal D.A.R. 4702, 4705 (9th Cir. 1990); *Theee Movies of Tarzana v. Pacific Theatres, Inc.,* 828 F.2d 1395, 1400-1401 (9th Cir. 1987), *cert. denied,* 108 S. Ct. 1028 (1988). *See also, Universal Analytics, supra,* 707 F. Supp. at 1180.

6.6 Under this standard, even the presence of a predatory motive "will not make otherwise lawful conduct (i.e., conduct engaged in for a legitimate business purpose) unlawful." *Universal Analytics, supra,* 707 F. Supp. at 1180 (citation omitted). As the Ninth Circuit in *Oahu Gas Service* stated:

> Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 105 S. Ct. 2847, 86 L.Ed.2d 467 (1985); *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1478 (9th Cir. 1986); *Drinkwine v. Federated Publications, Inc.,* 780 F.2d 735, 740 (9th Cir.), *cert. denied,* 475 U.S. 1087, 106 S. Ct. 1471, 89 L.Ed.2d 727 (1986).

Oahu Gas Service, supra, 838 F.2d at 368.

6.7 Under this view of the legitimate business justification defense, the Ninth Circuit has found a variety of conduct not to be in violation of the antitrust laws. *See, e.g., Oahu Gas Service,* 838 F.2d at 360 (monopolists-suppliers' decision not to expand refinery justified where investment required would have resulted in negative return because of price controls); *The Jeanery, Inc. v. James Jeans, Inc.,* 849 F.2d 1148, 1159-60 (9th Cir. 1988) (improvement of the defendant's distribution network); *Mozart Co. v. Mercedes-Benz of North America, Inc.,* 833 F.2d 1342, 1349 (9th Cir. 1987), *cert. denied,* 109 S. Ct. 179 (1988) ("*Mozart*") (quality control over the products and services pro-

vided by the defendant); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir. 1985), *cert. denied*, 475 U.S. 1087 (1986) (same).

7. THE CONDUCT CHALLENGED BY VERNON DOES NOT VIOLATE § 2 OF THE SHERMAN ACT

(a) *Vernon's Relative Size Share Access Claim*

7.1 Even assuming that Edison has monopoly power and viewing Edison's transmission facilities and rights as an "essential facility", Vernon cannot sustain its allegations of an antitrust violation premised on Edison's refusal to provide relative size share transmission access. Under the essential facilities doctrine, Edison is only required to give Vernon reasonable access to its transmission network. *See, e.g., Southern Pacific Communications Co. v. AT&T Co.*, 740 F.2d at 1009; *In Re Air Passenger Computer Reservations Systems Antitrust Litigation*, 694 F. Supp. 1443, 1451 (C.D. Cal. 1988). Reasonable access does not include that which would harm Edison's other customers or which would be impractical. *Southern Pacific Communications Co. v. AT&T Co., supra*, 740 F.2d at 1009, quoting *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

7.2 Moreover, even complete denial of access to an essential facility is not an antitrust violation where there is a legitimate business justification for the denial. *See, e.g., Image Technical Service, Inc. v. Eastman Kodak Co., supra*, 90 Daily Journal D.A.R. at 4705; *Becker v. Egypt News Co., Inc.*, 713 F.2d 363, 366 (8th Cir. 1983); *Venture Technology Inc. v. Nat'l Fuel Gas Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,780, at 78-169 (W.D.N.Y. 1981), *rev'd on other grounds*, 685 F.2d 41 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982).

7.3 Under the standards articulated in the foregoing cases, Edison's failure to allow Vernon "relative size share" access to Edison's EHV lines is not unlawful anticompetitive conduct. Vernon has conceded that if Edison granted Vernon the access it has demanded, the costs for Edison's other customers would increase. Even assuming competition exists between Edison and

Vernon, Edison is not obligated by the antitrust laws to confer a benefit on Vernon at the expense of its own customers. *Town of Massena v. Niagara Mohawk Power Corp.*, 1982-82 Trade Cases (CCH) ¶ 63,526 (N.D.N.Y. 1980), *see also, Hecht,* 570 F.2d at 992-93 ("antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately").

7.4 Edison's justification for not granting Vernon relative size share access is distinguishable from that proffered by the utility, and rejected by the Supreme Court, in *Otter Tail Power Co. v. United States,* 410 U.S. 366, 372 *reh'g denied,* 411 U.S. 910 (1973). In *Otter Tail,* the Court addressed a situation where the Otter Tail Power Company had refused to sell wholesale power to municipal systems and refused to wheel power as well. Otter Tail's total refusals were motivated by an intent to retain the municipals as all-requirements customers. This result was achieved by these absolute refusals to deal on an "essential facility." Otter Tail did not argue that it lacked excess transmission capacity to provide transmission service or that its transmission system could not accommodate new imports wheeled into its municipal customers. Otter Tail's only justification for its refusals to deal was the desire to keep its municipals (and future municipals) as captive customers.

7.5 The facts now before this Court are not analogous to those of *Otter Tail.* First, Edison has not refused to sell wholesale power to Vernon. Edison has had in place a partial requirements resale rate and there is no evidence that Edison ever threatened, or even suggested, that it would terminate that service. Second, Edison has not refused to wheel power to Vernon. As is stated above, Edison has provided Vernon with significant transmission service (or "wheeling") for outside resources, and as a result, Vernon is now buying relatively little power from Edison. Most of Vernon's power needs are being met from outside resources "wheeled" to Vernon by Edison. Third, Edison's denial of access to its transmission system was motivated by a desire to benefit its own customers rather than just Vernon. This is a legitimate business justification.

7.6 As a matter of law, Edison's conduct with respect to transmission has not been unreasonably exclusionary.

(b) *Vernon's IOA Claim*

7.7 The issue in regard to the IOA claim is not whether Edison can foreclose access to outside resources since it is clear that Edison has offered Vernon an IOA and access to outside resources. An IOA and access has been made available to Vernon on the same terms and conditions as for the other Resale Cities; Vernon made a decision to restrict its own IOA to its Palo Verde purchases.

7.8 As with Vernon's demand for relative size share access, to the extent that Edison had a duty to integrate Vernon's power purchases, that duty is not absolute; it is limited by Edison's legitimate business justifications.

7.9 Even assuming an obligation of Edison to furnish a different IOA than what was actually offered to Vernon, the Court concludes that Edison had a legitimate business justification for not providing Vernon with an IOA with only an 18-month notice period for capacity additions to the Edison control area.

7.10 The Court further notes that Vernon has previously asserted, and the FERC has concluded, that a three-year notice period is appropriate, and hence antitrust liability cannot be premised in this action based upon an IOA that has only an 18-month notice period.

7.11 Vernon's damage study improperly assumes that the failure of Edison to provide an IOA with an 18-month notice provision was unlawful, since the failure to provide Vernon with an IOA with an 18-month notice provision is not an antitrust violation.

7.12 Vernon has presented no evidence which raises a triable issue of fact with respect to the IOA.

(c) *Vernon's Special Condition 12 Claim*

7.13 In that the Court has concluded that there is and has been a legitimate business justification for Edison refusing to

allow the import of capacity resources into the Edison control area on less than three-years' notice, the Court further concludes that Edison was under no obligation under the antitrust laws to offer Special Condition 12 to Vernon.

7.14 Vernon's Special Condition 12 claim is analogous to that raised by the plaintiff in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co., supra,* 797 F.2d at 376, and was rejected by the court in that case. In *Olympia,* the plaintiff alleged that Western Union's withdrawal of assistance in marketing telex equipment constituted a Sherman Act § 2 violation. The court rejected the plaintiff's contention. Reasoning that a monopolist has no generalized duty to extend a helping hand to its competitors. The court concluded that Western Union's withdrawal of voluntary assistance could not possibly constitute a § 2 violation.

> If a monopolist does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does not incur antitrust liability? We think not.... Since Western Union had no duty to encourage the entry of new firms into the equipment market, the law would be perverse if it made Western Union's encouraging gestures the fulcrum of an antitrust violation.

Id., 797 F.2d at 376.

7.15 This rationale applies equally to Vernon's contentions concerning the availability of Special Condition 12. Here, Edison had no duty under the antitrust laws to provide Special Condition 12 treatment to Vernon. Having no such obligation, its failure to provide Special Condition 12 earlier than it actually did cannot be the basis of a § 2 violation.

7.16 The Court concludes that Edison had a legitimate business justification for not implementing Special Condition 12 earlier than it did.

7.17 Vernon's damage study improperly assumes that the failure of Edison to initiate Special Condition 12 earlier than it did was unlawful, since the failure to initiate Special Condition 12 earlier was not an antitrust violation.

7.18 Vernon has presented no evidence which raises a triable issue of fact with respect to Special Condition 12.

7.19 Because two of Vernon's damage scenarios are predicated upon the existence of Special Condition 12 years before it was actually offered, the conduct underlying these scenarios is not a violation of § 2 of the Sherman Act.

(d) *Vernon's Interruptible Transmission Service Claim*

7.20 The granting of summary judgment with respect to Vernon's contentions based upon purportedly improper denials, interruptions, or curtailments of ITS for nonfirm energy is mandated on three separate grounds.

7.21 First, Vernon has failed to quantify any damages arising from any of these interruptions. As the Court explained in its "Memorandum of Decision" (at 14-16), a plaintiff must show some measurable damages flowing from an antitrust injury in order to meet the requirements of § 4 of the Clayton Act, 15 U.S.C. § 15. Vernon has failed to make this showing.

7.22 Second, Vernon's concerns in regard to interruptions at best involve the interpretation of contract language giving Edison discretion as to when interruptions can be made. A contractual dispute as to the reasonableness of conduct is not enough to support an antitrust claim. *See Universal Analytics, supra,* 707 F. Supp. 822, 828 (N.D. Cal. 1986). *See, also, Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.,* 19892 Trade Cas. (CCH) ¶ 68,751, at 61,950 (10th Cir.).

7.23 Third, the Court concluded that Vernon has failed to demonstrate that Edison's reasons for interrupting were not legitimate.

8. THE CHALLENGED CONDUCT VIEWED SEPARATELY AND AS A WHOLE

8.1 In examining Edison's conduct that is alleged to give rise to damages, the Court has concluded that the challenged conduct does not constitute a violation of § 2 of the Sherman Act. None of the challenged conduct individually amounts to an antitrust

violation and viewing the conduct in its totality does not change any of the conclusions as to the propriety of the conduct.

8.2 At times in its opposition, Vernon argued that a number of other Edison alleged acts or conduct constituted evidence of violations of the antitrust laws. Vernon, however, failed to link any of these other alleged acts to any quantifiable damages, and Vernon makes no claim of damages or injury arising from these alleged acts. Nor has Vernon presented any arguments to demonstrate that any such acts or conduct has any sort of synergistic effect when viewed as a whole.

8.3 Accordingly, for the reasons set out at pages 19-20 of the Court's Memorandum of Decision, the Court concludes that summary judgment in favor of Edison and against Vernon is appropriate.

9. CONCLUSIONS

9.1 To the extent that the foregoing Conclusions of Law are also Statements of Fact, they are intended to be Findings of Fact as well.

9.2 Defendant Edison is entitled to summary judgment on Vernon's foreclosure damage claims in this action.

9.3 Having granted summary judgment in favor of defendant Edison and against plaintiff Vernon on all damage claims in this action and made the above stated Findings and Conclusions, the Court asked plaintiff Vernon to advise the Court of what remained for trial. Vernon advised the Court that the foregoing Findings of Fact and Conclusions of Law address and dispose of all remaining claims of Vernon herein, including those in Claim I of the First Amended Complaint for which Vernon is seeking relief. As a consequence, judgment in this action should now be entered in favor of defendant Edison and against plaintiff Vernon, with Edison to recover its costs of suit herein.

Dated: August 30, 1990

MARIANA R. PFAELZER

Mariana R. Pfaelzer
United States District Judge

CERTIFICATION OF SERVICE

I hereby certify that I have served the foregoing APPELLANT'S DOCKET SHEET on all parties of record in this proceeding, Civil No. 90-56281, by placing a copy of the document in a properly addressed envelope and sending by overnight courier to the following parties or attorneys of parties:

Paul G. Bower, Esq.
Gibson, Dunn & Crutcher
2029 Century Park East
Suite 3860
Los Angeles, California 90067-3026

DATED: December 12, 1990

JOSEPH J. O'MALLEY
Joseph J. O'Malley
Attorneys of Record for
Plaintiff-Appellant City of Vernon

CASE NO. CV 83-8137 MRP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CITY OF VERNON, CALIFORNIA,
Plaintiff,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
Defendant.

JUDGMENT

The Court having granted Edison's Motions for Summary Judgment on plaintiff's foreclosure claims, rate claims and group boycott claims, and having filed its Memorandum of Decision and Findings of Fact and Conclusions of Law thereon, and the issues having been duly heard and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff City of Vernon take nothing in this action, that this action be dismissed on the merits and with prejudice, and that defendant Southern California Edison Company shall recover from plaintiff City of Vernon its costs in this action in the amount of $.

DATED: August 30, 1990

Mariana R. Pfaelzer
United States District Judge

GIBSON, DUNN & CRUTCHER
PAUL G. BOWER
ARTHUR L. SHERWOOD
RICHARD D. HALL
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

DAVID N. BARRY, III
RICHARD K. DURANT
JANET K. LOHMANN
2244 WALNUT GROVE AVENUE
ROSEMEAD, CALIFORNIA 91770
(818) 302-3844

Attorneys for Defendant
Southern California Edison Company

NO. 83-8137-MRP (MCX)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CITY OF VERNON,
Plaintiff,
v.
SOUTHERN CALIFORNIA EDISON COMPANY,
Defendant.

ORDER DENYING VERNON MOTION FOR RECONSIDERATION

HEARING: October 15, 1990
10:00 a.m.
Courtroom of the Honorable Mariana R. Pfaelzer
TRIAL DATE: None

The motion of plaintiff City of Vernon "For Reconsideration of this Court's Granting of Defendant Southern California Edison Company's Motion for Summary Judgment on Plaintiff's Foreclosure Damage Claims" (the "Motion") came on for hearing

before the Court on October 15, 1990, with counsel for both parties appearing. After hearing and considering the arguments of counsel and the papers filed in connection with this Motion, and the Court having determined that there is not good cause for the granting of the Motion, the Motion of the plaintiff City of Vernon is hereby denied.

DATED: October 22, 1990

Mariana R. Pfaelzer
United States District Judge

PREPARED AS TO FORM:

GIBSON, DUNN & CRUTCHER
PAUL G. BOWER
ARTHUR L. SHERWOOD
RICHARD D. HALL
DAVID N. BARRY, III
RICHARD K. DURANT
JANET K. LOHMANN

By _____
Arthur L. Sherwood
Attorneys for Defendant
Southern California Edison Company

APPROVED AS TO FORM:

PAUL HASTINGS, JANOFSKY & WALKER
JOSEPH J. O'MALLEY

By_____
Joseph J. O'Malley
Attorneys for Planitiff
City of Vernon

No. 90-1544

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1990

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner
vs.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent
FILED July 5, 1991

ORDER

Upon consideration of petitioner's motion for voluntary dismissal and it being represented that no opposition thereto will be filed, it is

ORDERED that petitioner's motion be granted. The Clerk is directed to send a certified copy of this order to respondent in lieu of formal mandate.

FOR THE COURT:
Constance L. Dupré, Clerk

By: /s/ MARYANNE McMAIN
MaryAnne McMain
Deputy Clerk

[27 FERC ¶ 63,053]

Southern California Edison Company, Docket No. ER81-177-002 (Phase II) Initial Decision

(Issued May 18, 1984)

Jacob Leventhal, Presiding Administrative Law Judge

Procedural History

The genesis of this proceeding lies with a rate increase tendered for filing by Southern California Edison Company (Edison or Company) on December 16, 1980 . . . . The instant proceeding, entitled Phase II, was severed from the general rate filing after Vernon's request for phasing, dated March 17, 1982, was granted on May 3, 1983 . . . .

Essentially, Phase II was established to determine the reasonableness of the Integrated Operations Agreement (IOA), a series of identical agreements which Edison has entered into independently with Cities. The IOA is a document which enumerates the services to be provided by Edison to its customers and dictates the terms and conditions of those services. Acceptance of the IOA has been treated by Edison as a condition precedent to a customer's receipt of partial-requirements service. Vernon does not presently receive such service but is desirous of becoming a partial-requirements customer of Edison's. Vernon, however, takes issue with the terms of the IOA proffered by Edison in return for rendering the partial-requirements service. Vernon maintains that this IOA, which is identical to those already in existence with Cities, contains provisions which are unreasonable and onerous. Cities have joined with Vernon in requesting a major alteration of the IOA.

* * *

[65,195]

II. Amount of Energy Available Under Scheduled TOU-R When a City Capacity Resource Is Not in Operation

The Joint Statement of Issues (Exhibit 302) poses the issue as follows:

> Is the method in the IOA for establishing the responsibility for meeting a city's load requirements a fair and reasonable approach, or does this method result in unfair and unreasonable restrictions on the amount of energy which can be purchased by a city under Schedule TOU-R?

This issue involves Sections 15.1.2, 16.2, and 16.2.2.1 of the Integrated Operations Agreement (IOA). The Cities, who are signatories of the IOA, and Vernon, which is not a signatory, suggest an amendment of the terms of these sections on the ground that they result in an unjust, unreasonable, and discriminatory rate. The problem, more concisely, concerns the provisions of these sections which provide that the amount of energy available to a city each hour under the partial-requirements rate schedule TOU-R shall be the total energy requirement of the city during that hour reduced by the greater of (i) the energy during that hour from the city's integrated resources, or (ii) the amount of energy capability associated for that hour with the then effective capacity credit.

Under the terms of the IOA, a city's own generation units are integrated with Edison's capacity. The capacity credit is calculated by taking the rated capability of those units and reducing it by the amount of reserve the city contributes to the Edison system.

The critical problem arises when a city's generating facilities are closed down for periodic maintenance, repair, or any other reason. Then, the IOA provides that the city shall purchase from Edison "contract energy." Contract energy is based upon the incremental costing concept which assumes that the use of Edison's facilities consumes the most expensive fuel.

According to Edison, the IOA divides the load of a city into two parts with the capacity credit as the dividing line. Up to the limit of its capacity credit, the city is responsible for supplying its own energy needs. If it cannot do so, then it may either replace the energy from

[65,196]

some other source or purchase contract energy from Edison. This is a below-the-line transaction.

For energy requirements above the capacity credit, the city is charged on an average cost basis. This is an above-the-line transaction.

Edison defends this practice on the ground that the city is not paying a demand charge for energy within the limits of its capacity credit. If this provision were to be eliminated, Edison asserts that the cost of maintaining the utility's capacity would be passed on to other customers and therefor would be unfair.

* * *

[65,197]

* * *

Ruling

* * *

Thus the question is: Do the partial-requirements customers taking energy under the IOA and the TOU-R schedule pay the demand charge associated with the capacity credit?

The testimony and the briefs deal with the issue at some length. However, at the core of the controversy is whether the demand charge paid by the partial-requirements customers under the IOA and the TOU-R schedule include capacity required to replace the customer's own generation for which it has received a capacity credit. If a demand charge has been paid, the customer is entitled to the energy up to the limit of the demand at average system cost.

* * *

I agree with Staff that the partial-requirements customer should be able to purchase the maximum amount of energy

[65,198]

each hour associated with the maximum demands it imposes on the Edison system as reduced by the capacity credit it receives. I similarly agree with Staff that incremental pricing is appropriate for customers who have not paid their fully allocated costs.

* * *

Edison attempts to distinguish the present proceedings from either *Kansas* or *Northern*. Edison argues that the latter case involved a true capacity reservation which prompted the Judge to find that the limitation was not cost justified and would result in an overrecovery of energy costs. However, the decision also turned on the proposition that a customer is entitled to the energy for which a demand charge has been paid.

The argument made by Edison that *Northern* involved another type of capacity reservation is also not convincing. Although the details of the tariff provision differ from those in the present proceeding, the principle enunciated is the same. If the partial-requirements customer pays demand charges on the same basis as the full-requirements customer, it should be entitled to the same energy charges up to the limit of the demand charge.

Edison has complete control of the dispatch of Cities' generating units since their units are integrated with Edison's units. Edison operates the Cities' units according to control area requirements. Edison does not schedule power to the Cities like it does with utilities outside its control area. (Ex. 367-T at 9-11.) Since Edison does not operate Cities' generating units according to Cities' requirements, its premise that the IOA's capacity credit provision changes the character of the Cities-Edison relationship is not accurate. In reality, Cities' relationship with Edison is always that of a utility-customer and never one of utility-to-utility. Edison is responsible for supplying all of Cities' energy needs — and thus all energy within the limit of the demand charge should be supplied on an average cost basis.

The Cities, with generation, are in fact full-requirement customers, and they are properly receiving the same TOU-R rate as a customer without generation. Granting a demand credit for the use of a city's generating unit does, by definition, classify it as a partial-requirements customer, but only on paper. In *Northern* and *Kansas*, the Cities there operated their generation independently of the suppliers. A partial-requirements customer of Edison does not truly operate its generation as baseload or peaking since Edison has complete control over the customer's generation. Edison operates these units as if they were owned by Edison. (Id. at 9.) For the use of that generation, the Cities obtain a credit against its demand charge. But all of a city's load is part of the control area load, whether or not it has its own generation, and Edison is responsible for the entire control area load.

I find that adoption of Staff's proposal will eliminate the undesirable portion of the IOA relating to this issue.

III. City Contribution to Installed Reserves

Section 12.2 of the IOA provides that the city's contribution to installed capacity reserves (expressed as a percent of the rated capability of the city's capacity resources) is determined annually and shall be equal to the average of the five annual reserve margins (expressed as a percentage of annual peak) of the combined firm loads of the parties planned for the next five years.

* * *

The nub of the dispute is really whether the price the Cities are paying for the service received is higher than warranted. Under the

IOA, a city's TOU-R billing demand is reduced by a capacity credit. This credit is computed by subtracting the reserve margin from the rated capability of the city's generation. Thus, a higher reserve margin results in a lesser capacity credit with a resulting greater billing demand.

Cities, Vernon, and Staff object to the method used and the calculation of the reserve margin for a city. The opposition notes that for its own reserve, Edison uses 18%+ or −2% applied to its load to convert the percent reserve to kilowatts. The Edison percentage is a target reserve used for planning, not billing. On the other hand, the projected reserve percentage directly affects the capacity credit and consequently the cost of energy to the cities. Thus, they and Staff contend that for billing purposes a precise standard is needed for application to the cities. They propose a flat eighteen percent, the center point of the band used by Edison for its own reserve calculation. The eighteen percent is to be applied to the city's load, not capacity. If conditions change, as it is recognized could occur, the reserve margin can be amended in future rate proceedings. (Staff I.B. at 41-45.)

* * *

Ruling

[65,200]

The formula used to convert percent reserve requirements to kilowatts should be the same for a city as it is for Edison. Under the proposal by Vernon, supported by Staff, the city's capacity credit is used as a proxy for the load of the resale city and thus applies the percentage to the capacity credit. This is a reasonable method and is adopted here.

The proposal by Cities, Vernon, and Staff for the application of eighteen percent to the Cities' load to ascertain the required reserve margin leads to a reasonable result and is also adopted.

Section 12.2 will be amended accordingly.

* * *

[65,201]

VI. Qualifications for Integration of City Capacity resources

VII. Procedures for Integration of City Capacity Resources

VIII. Qualifications for Integration of City Transmissions Facilities

Issues VI, VII, and VIII present questions as to the reasonableness of various provisions of Section 8 of the Integrated Operations Agreement pertaining to the qualifications and procedures for integrating city capacity resources and transmission facilities. Although these three issues have been individually briefed by some of the parties, they will be discussed together under this heading since they are similar in content.

[65,202]

Section 8.1.2.1

Section 8.1.2.1 is the first of these provisions to be discussed by the parties. It reads as follows:

> A City Capacity Resource proposed by City shall be of appropriate size, type, reliability, design and operating characteristics and shall be capable of performing in a manner equivalent to Edison Capacity Resources.

* * *

Ruling

Rather than clarifying the qualifications for integration of a city capacity resource, Edison's proposal would create more ambiguity. Not only would it be extremely difficult to ascertain whether the California standard has been met, as Vernon and Staff point out, it does not add anything of value to "good utility practice." Section 8.1.2.1 as it stands now, is also unacceptable. It leaves to much discretion in Edison's hands for rejecting a proposed integration. At the same time it creates an undue burden on a city to try to duplicate Edison's facilities. Accordingly, the proposal put forth by Staff, Vernon, and Cities is adopted.

* * *

. . . On balance, the existing provisions are not unfair and the recommended changes are rejected.

Section 8.1.3.3

Section 8.1.3.3 is controversial for much the same reason as Section 8.1. Section 8.1.3.3 states:

> Within 60 days of the later of (i) receipt by Edison of the information on a proposed City Capacity Resource pursuant to Section 8.1.3.1 or (ii) the agreement on Transmission Facilities as required by Section 8.1.2.5, Edison shall inform City in writing as to its decision regarding acceptance for integration of the proposed City Capacity Resource. If such proposed City Capacity Resource meets the qualifications for integration, Edison shall use its best efforts to integrate the proposed City Capacity Resource. If such proposed City Capacity Resource meets the qualifications for integration, Edison shall use its best efforts to integrate the proposed City Capacity Resource. If Edison concludes that the proposed City Capacity Resource does not meet the qualifications for integration, Edison shall so inform City of Edison's opinion and shall, based upon Edison's preliminary studies, fully state in detail the reasons for its conclusion. Thereafter, within 30 days following a request by City, Edison shall make available for examination by City, the plans and specifications for similar Edison existing or planned capacity resources.

* * *

Ruling

The request that Edison "use its best efforts" to integrate be deleted is granted for the same reason it was granted with respect to Section 8.1. Its presence connotes an excessive amount of discretion in the integration determination. However, there is no merit to Vernon's other complaints. The phrases objected to are not onerous. Accordingly, Section 8.1.3.3 will remain in effect as is, except that Edison's obligation to integrate shall be absolute if the proposed city capacity resource meets the qualifications for integration.

* * *

[65,208]

* * *

[65,212]

XIII. Peaking and Intermediate Capacity

Issue XIII has been set forth in the Joint Statement of Issues as follows:

> Whether the IOA should be revised to cover the City's peaking and/or intermediate generating facilities and, if so, what the revision should be.

This issue has arisen due to the IOA's failure to provide for peaking or intermediate generating facilities, stemming from its inability to differentiate between baseload, intermediate, and peaking units.

Cities, Staff, and Vernon are in accord that the root of the problem lies with the energy restrictions imposed by IOA Section 15.1 and the contract energy provision in Section 16.2. Accordingly, they all agree that the modifications to the above IOA sections proposed in Issues II and IV would alleviate the flaws addressed under this heading as well.

Edison, while apparently conceding that a revision is required in order to allow a city to make economic use of peaking and intermediate facilities, disagrees with the solution offered by Cities, Staff, and Vernon.

* * *

The opposition of Cities, Vernon, and Staff is well taken. The rulings made on Issues II and IV dispose of the problem posed here. Edison is urging the addition of a new section to the IOA by the adoption of one of three alternative suggestions. They maintain, and I agree, that the problem has become moot. Further change is not necessary.

The proposed addition to the IOA sponsored by Edison is rejected.

Findings and Conclusions

Upon consideration of the evidentiary record and the briefs in this proceeding, it is found and concluded:

(1) Southern California Edison is a public utility under the Federal Power Act.

(2) The Integrated Operations Agreement herein involve sales of electric energy and are subject to the jurisdiction of this Commission.

(3) The sections of the Integrated Operations Agreement shall be modified in compliance with the rulings made in this decision.

(4) The terms and conditions of service contained in the agreements as modified by the rulings made above have been shown to be just and reasonable and otherwise lawful.

[41 FERC ¶ 61,188]

Southern California Edison Company, Docket No. ER81-177-002 (Phase II)
Opinion No. 289; Opinion and Order on Initial Decision
(Issued November 19, 1987)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Initial Decision of the Presiding Administrative Law Judge, issued May 18, 1984, appears at 27 FERC ¶ 63,053]

[Opinion No. 289 Text]

I. Introduction and Summary

The case commenced on December 16, 1980, when Southern California Edison Company (Edison) filed for a general rate increase for firm service to its wholesale customers. Subsequently, the proceeding was separated into two phases. Phase I involved various cost-of-service and rate design issues.[1] The instant proceeding, Phase II, deals with the reasonableness of an Integrated Operations Agreement (IOA) between Edison and certain municipal customers.

The IOA is a generic agreement which the Cities of Anaheim, Riverside, Banning, Colton and Azusa, California (Cities) have each entered into as a precondition to receiving partial requirements service from Edison under rate schedule TOU-R. The City of Vernon, California (Vernon) has also been offered partial requirements, integrated operations service similar to that provided to Cities, but disputes the reasonableness of the IOA which has been offered to Vernon by Edison. Cities join Vernon in its dispute with Edison over specific provisions of the generic IOA. Cities'

[61,490]

existing IOAs with Edison allow them existing IOAs with Edison allow them to: receive capacity and energy credit for resources they may integrate with Edison's system; pay TOU-R rates when these integrated resources meet defined availability, scheduling and reserve requirements; purchase generally higher priced contract energy[2] or replacement capacity when the integrated resource requirements are not met; participate to some extent in partial ownership of Edison's new generating units; and receive various other integrated operations services and rights. The IOAs are intended to provide a practical procedure by which Cities can meet some or all of their electric loads through acquisition of non-Edison resources, while remaining within Edison's control area.

Vernon is also eligible to receive partial requirements service under rate schedule TOU-R. Vernon has not signed the same type of "generic IOA" entered into by Cities, but does have a resource-specific IOA with Edison for purposes of integrating its interest in the Palo Verde Nuclear Generation Station.[3] Additionally, Vernon owns diesel generators which are nonintegrated and operate on its side of Edison's billing meters. Vernon does not have a broad agreement with Edison for integrated operation of other resources.

This proceeding is presently before the Commission on exceptions to an Initial Decision in Phase II.[4] Briefs On and Opposing Exceptions were filed by Cities, Edison, Vernon[5] and the Commission trial staff (staff).

There are ten issues before the Commission on exceptions, as follows:[6]

I. the standard and burden of proof to be applied in modifying the IOAs;

II. the amount of energy available under Schedule TOU-R when a City capacity resource is not in operation;

III. the City contribution to installed reserve;

IV. the energy dispatched by Edison from City's reserve capacity;

VI. the qualifications for integration of City capacity resources;

VII. the procedures for integration of City capacity resources;

VIII. the qualifications for integration of City transmission facilities;

IX. the replacement capacity;

XI. the contract energy pricing; and

XIII. the peaking and intermediate capacity.

II. Discussion

We affirm the Judge with additional discussion on Issues I and II. We affirm the Judge on other grounds on Issue IV. We reverse the Judge on Issues VII and XIII. We summarily affirm the Judge on Issues III, VI, VIII, IX and XI.

A. ISSUE I — The Standard and Burden of Proof to be Applied in Modifying the IOAs

The issue presented is what standard applies when Edison's customers, i.e., Cities, seek to modify their executed contracts, and who bears the burden of proof. We summarily affirm the Judge's ruling concerning the standard and burden of proof with respect to Vernon. We also summarily affirm the Judge's ruling

that Cities can challenge individual provisions of the IOA rather than having to show that the IOA in

[61,491]

"its totality is unreasonable."[7] We affirm the Judge's ruling on Issue I subject to the following clarification of his discussion on the *Mobile-Sierra* doctrine.[8]

Mobile-Sierra establishes the applicable standard governing rate increases which may be allowed in cases where the utility and the customer have entered into a contract in which the rate is fixed for the life of the contract or some other specified period. Under *Mobile-Sierra*, a utility with such a fixed-rate contract cannot file for a rate increase[9] under section 205 of the Act that is contrary to the contract. It can obtain relief under section 206 of the Act only if it can show that the rates under the contract are "so low as to adversely affect the public interest — as where it might impair the financial ability of the public utility to continue its service, cast upon other customers an excessive burden, or be unduly discriminatory."[10]

The Judge stated that Cities "are required to show that the provisions of the contract are not in the public interest because the terms are unjust and unreasonable."[11] He ruled that the proper method of challenging Cities' executed IOAs is under section 206 of the Act where the burden is on Cities and staff as complainants to establish a *prima facie* case that the provisions are unjust and unreasonable. However, the Judge also ruled that the ultimate burden of persuasion as to the justness and reasonableness of the terms lies with Edison.[12]

* * *

Edison states that the IOA provides only Edison with the option, in limited circumstances, of seeking to modify the rates in the IOA, and that there is no right reserved by either party to seek modification of other provisions in the IOA. Edison argues that in the absence of any reserved right to seek changes, the terms and conditions of service may be modified only upon a showing that they are against the public interest.

We do not agree. In determining the meaning of the contract, general principles of contract interpretation apply. As the court said in *Papago Tribal Utility Authority v. FERC* in a rate revision contest, " '[i]n the absence of ambiguity the intent of the parties to a contract must be as ascertained from the language thereof without resort to parol evidence or extrinsic circumstances.' "[16] The IOA does not contain any provision which indicates that Cities waived their right to seek modification of the IOAs' terms and conditions under section 206 of the Act.

* * *

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We agree with the Judge that Cities and staff have the burden of coming forward and establishing a *prima facie* case that the provisions in the IOA are unjust or unreasonable. However, as the Judge further correctly noted, section 206 of the Act does not refer to burden of proof. Thus, it is controlled by section 556(d) of the Administrative Procedure Act, which imposes the burden on "the proponent of a rule or order,"[23] but the burden imposed is one of coming forward with a *prima facie* case, not the ultimate burden of persuasion.[24] Therefore, once Cities and staff present a *prima facie* case for relief, the burden shifts to the respondent Edison to make a persuasive defense.[25]

B. ISSUE II — Amount of Energy Available Under Schedule TOU-R When A City Capacity Resource Is Not In Operation

We affirm the Judge's ruling on Issue II, with the following discussion. The issue presented is whether the IOA places unjust or unreasonable restrictions on the amount of energy which can be purchased by a city under rate schedule TOU-R.

* * *

Edison also states that even if a city's capacity resources were idle during Edison's monthly system peak hour, providing reduced reliability benefits, in the next rate case Edison would not be able to allocate additional demand costs to the wholesale class since a city's capacity credit is always subtracted from the class 12 CP

demand for cost allocation purposes. Edison thus views its relationship with the partial

[61,493]

requirements cities as fundamentally different from that with its other customers, warranting the pricing of energy corresponding with idle city capacity resources at incremental costs. What Edison overlooks, however, is that a city contributes reserves along with its capacity resources to compensate Edison for unforeseen and planned unit outages.

Staff argues that the situation described by Edison is extreme in that a city's use of a disproportionately large amount of average cost energy would occur, if at all, only during relatively short intervals. The existing IOA prices energy associated with any unavailable city capacity, during every hour, at Edison's incremental energy cost. As stated by staff: "[W]hile there is a kernel of truth to Edison's claim that staff's remedy is not totally perfect, Edison's alternative remains fundamentally unfair to the IOA cities."[28] We agree, and believe that staff's proposed remedy to this problem, adopted by the Judge, is the most reasonable one presented in the instant proceeding.

C. ISSUE IV — Energy Dispatched by Edison From City's Reserve Capacity

The issue presented is whether Edison derives a benefit from energy associated with a city's reserve capacity that is not adequately reflected in the IOA and, if so, whether revision of the IOA is necessary. The Judge stated that Edison receives a cost benefit[29] from dispatching a city's reserve capacity under the IOA, but that the benefit has been virtually eliminated through his ruling in Issue II. Furthermore, he stated that any residual inequity would be *de minimis*.[30] Although we agree with the results of the Judge's ruling, we do so on different grounds.

We agree with Vernon[31] that the Judge's ruling on Issue II does not moot Issue IV; however, we do not believe Vernon's proposed banking arrangement[32] is an appropriate remedy. For reliability purposes, Edison must maintain at least a minimum reserve level

on its system. Under the IOA, a city is required to contribute reserve capacity for resources integrated with Edison's system, a principle uncontested in this proceeding. Because it has adequate system reserves, Edison can operate Cities' resources, including reserve capacity, to achieve a decrease in system energy costs. The opportunity to realize this benefit, however, is derived from the integrated operation of Edison's control area. This savings inures to the benefit of all Edison's customers, including Cities. Cities will reveive their pro rata share of the system energy benefit.[33] The proposed treatment of the energy benefit to Edison's system derived from operating a city's reserve capacity is thus reasonable under the IOA.

D. ISSUE VII — Procedures for Integration of City Capacity Resources

Issue VII involves the appropriate time limit or standard under which Edison must allow integration of a proposed city capacity resource with its system. We reverse the Judge regarding sections 8.1.2.3, 8.1.2.4 and 8.1.2.6. We adopt a modified form of staff's proposal to delete section 8.1.2.4 and revise sections 8.1.2.3 and 8.1.2.6.

Under section 8.1.2.4, a proposed city capacity resource must be "compatible with (i) resources planned to serve the Edison Control Area, (ii) the resource schedule, and (iii) other resource plans periodically submitted by either party to regional agencies and organizations." Thus Edison may determine that a city's resource is unacceptable by merely altering its resource plan or submitting other resource plans to unspecified "regional agencies and organizations." Section 8.1.2.3 states that integration of such a proposed city capacity resource shall not require Edison to defer a proposed capacity resource listed by Edison in the current resource schedule for which Edison has made substantial financial or other commitments towards construction, unless the parties

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otherwise agree. This provision should be read in conjunction with section 8.1.2.6, which states that the parties shall agree upon

the date when such city capacity resource shall first be included in the resource schedule for planning purposes.

We agree with Vernon that these provisions give Edison and undue amount of discretion. Moreover, even if Edison does not abuse its discretion, these provisions unreasonably place a city in an uncertain situation, *i.e.*, guessing whether and when Edison will permit integration. An example illustrates the potential problem. Edison is not obligated to integrate a city capacity resource when Edison's own proposed resource would be deferred as a result. Thus, section 8.1.2.3 would require a city to defer the resource even though Edison may have the flexibility to defer that project or a different project or to include in its plans additional megawatts of capacity that had been contemplated for a slightly later date. In short, the IOA would hold a city to a higher standard of planning than is normal industry practice. In normal practice, projects are constantly being added, subtracted, deferred, and accelerated, and the total capacity available at a given time is never precisely the capacity level that was previously planned.

The IOA does not allow for the fact that a city's involvement in a project may typically occur at a different stage of project development than Edison's involvement. Edison will usually be involved with a project from its conception. On the other hand, a city cannot feasibly add capacity in large increments and may invest in projects that are already underway. Since the IOA does not accommodate the difference in lead time inherent in the difference in the stage of project development, a city is at a disadvantage when an attempt is made to coordinate integration under the IOA with the commencement of a commercial operation of a generating facility. The result is that the IOA authorizes Edison to subordinate a completed city project to an Edison project that may still be in the early stages of development or which may be deferred or never completed.[35]

It is reasonable to maintain the "substantial commitment" standard of section 8.1.2.3, but with a modification. As proposed by staff, the IOA would provide a three-year notice for the integration of a city capacity resource if the resource is less than fifty percent of a city's peak load, and a five-year notice if the

capacity resource is greater than fifty percent of a city's load and one percent of Edison's system load. A city seeking to diversify its sources of capacity would generally make an impact on Edison's system of less than one percent of system load. Edison's capacity resource planning appears sufficiently flexible to accommodate such a *de minimis* fluctuation in Edison's system resources, especially in light of a proposed three-year notice for the integration of a city capacity resource. Indeed, currently Edison requires a three-year notice of termination for its full requirements customers.[36] Thus, if any of these customers turn to alternative sources, Edison apparently believes that such a notice is sufficient for its planning purposes. Consequently, under these circumstances staff's proposed three-year notice requirement for partial requirements customers who intend to acquire and integrate a capacity resource[37] is reasonable. However, we find that the record does not support staff's further proposal that under certain load conditions a more protective five-year notice provision is appropriate.

E. ISSUE XIII — Peaking and Intermediate Capacity

The issue presented is whether the IOA should be revised to specifically address a city's peaking and/or intermediate resources and, if so, what the revision should be.

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On exceptions, Vernon and Edison claim that the instant problem is not moot, as stated by the Judge. However, both Vernon and Edison endorse the concept of voluntary negotiations ragarding this problem. Furthermore, Vernon, Cities and Edison note that this issue is before the Commission in Docket No. ER84-75-000, and can be pursued in that proceeding.

Edison has presented three possible approaches to revising the IOA to cover a city's peaking and intermediate generating facilties.[40]

As one option, a city may wish to acquire a peaking or intermediate facility which it dispatches itself on its side of the meter, after giving Edison adequate notice of the acquisition. The

record shows that Edison has an arrangement with Vernon for operation of its diesel generating units on Vernon's side of the meter.[41]

As a second option, a city may wish to integrate a peaking or intermediate facility under the current IOA provisions. Edison notes that this may be economically vaiable for a peaking facility with low energy costs, such as a hydropower peaking resource. A city would receive a capacity credit against its TOU-R demand charge and receive the value of low cost energy generated by its facility as an offset against TOU-R energy charges.

As a third option, a city would receive capacity credit for a peaking facility, but its exposure to purchasing contract energy would be limited. A city would only be obligated to pay incremental energy costs when its peaking unit was unavailable or unscheduled during designated and agreed upon peak hours, and then only when a city load is above its base load capacity credit line and exceeds the rate of delivery of a city's billing demand.

Overall, Edison states that Vernon is taking the unfair position that a city should be able to integrate and receive capacity credit for intermediate and peaking facilities

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without regard to whether such facilities would be useful and needed in Edison's control area. Edison claims that its offer to voluntarily negotiate along the lines of its three proffered proposals provides a reasonable vehicle for resolution of this issue.

Edison submits that the Commission should correct the Judge by noting that the problem is not moot in the instant proceeding. Vernon indicates that a combination of adopting its recommendations under Issue IV and voluntary negotiations between the parties is appropriate. Edison and Cities appear to prefer that the issue be pursued in other dockets.

* * *

We reverse the Judge's ruling that his holding on Issues II and IV disposes of the issue here and that the issue is moot. We find that this record does not present the substantial evidence neces-

sary to modify the existing IOA to specifically address the acquisition and operation of a city's peaking and intermediate resource. We note, however, that it appears that the parties are pursuing Issue XIII through other Commission proceedings.[43]

The Commission orders:

(A) The Initial Decision issued in Docket No. ER81-177-002 (Phase II) on May 18, 1984 is hereby affirmed and adopted except to the extent modified or reversed herein. Exceptions to the Initial Decision not granted in this Opinion are hereby denied.

(B) Within 45 days following the date of issuance of this order, Edison shall file any necessary amendments to the subject IOAs with Cities in accordance with the findings and conclusions of this decision and with the Commission's regulations. In the event a request for rehearing is pending at the close of the 45-day period, however, the aforementioned filing shall be made no later than 30 days from the date the request for rehearing is disposed of.

(C) Subdocket 002 of Docket No. ER81-177 is hereby terminated. A new subdocket will be assigned to the compliance filing ordered in Ordering Paragraph (B).

[Footnotes Omitted]

Re SCEcorp

Additional applicants: Southern California Edison Company; San Diego Gas and Electric Company

Decision 91-05-028
Application 88-12-035

California Public Utilities Commission
May 8, 1991

ORDER disapproving a proposed merger between Southern California Edison Company and San Diego and Electric Company.

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2. *The Commission's Review*

Early in this proceeding, applicants contended that the proposed merger's impact on transmission access and competition in bulk power sales markets were within the exclusive jurisdiction of FERC. We reject this contention for reasons articulated twenty years ago. *Northern California Power Agency v. Public Util. Com.* 5 Cal.3d 370 (1971), delcared:

> It is no longer open to serious question that in reaching a decision to grant or deny a certificate of public convenience and necessity, the commission should consider the anti-trust implications of the matter before it. The Commission itself has stated: 'There can be no doubt that competition is a relevant factor in weighing the public interest' . . .
>
> Although the commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the commission is obligated to weigh antitrust policy, [citations omitted.] . . . This is not to suggest, however, that regulatory agencies have jurisdiction to determine violations of antitrust laws. [citations omitted] Nor ar the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate

antitrust policies where other economic, social, or political considerations are found to be of overriding importance. In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give 'understandable content to the broad statutory concept of the public interest.' [citations omitted]

* * *

It is true that sections 4, 9, 15, and 15a of Title 15 of the United States Code give the federal courts exclusive jurisdiction over antitrust actions brought by the federal government and over certain private suits under the federal antitrust laws. However, those sections clearly do not foreclose the Commission from consideration of antitrust matters. . . . (5 Cal.3d 377-378.)

* * *

As applicants note at OB, p. VI-27, we have used federal precedents in the past, and do so in this decision, due to the well-developed body of available federal antitrust authority.[23] However, our decision making authority over this merger, and its broad public interest aspects, is not so limited that it must be premised on whether the acquisition violates federal antitrust statutes.

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We now review the historical examples addressed by the parties.[33]

First, the evidence of Edison's abuse of Interruptible Transmission Service (ITS) curtailment, provided by Edison's former Energy Control Center Senior Operations Supervisor McCann, is not rebutted effectively by applicants. Applicants' argument, that Resale Cities benefit as Edison customers whenever Edison curtails in order to take cost-effective firm or economy energy, misses the point. Even if true, this justification ignores the economic harm to Resale Cities, as retail competitors of Edison, caused by the abuse of ITS curtailment procedures (McCann,

Exh. 44,100, pp. 24-30). It is precisely this type of competitive harm, rooted in the competition between Edison and the Resale Cities to obtain least cost resources to meet their retail customers' needs, which must be assessed in the review of this merger's vertical impacts.

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In connection with claimed line-loading problems which arguably prevented Nevada Power from selling power to Vernon (Attorney General's Opinion, p. 30), the effect of Edison's actions was to shift a portion of the loop flow burden to NPC while also precluding Vernon's purchase from NPC.

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In connection with Edison's refusal to schedule nonfirm transmission more than an hour in advance, it appears that Edison has the ability to supply nonfirm transmission to the Resale Cities on a prescheduled basis and that there is no operational impediment in issue. Edison would retain the ability to interrupt prescheduled ITS to the same extent and on the same terms as interruptible transmission provided on an hour-by-hour basis. The problem is a refusal to provide for prescheduling by contract or otherwise. Without the ability to preschedule, the Resale Cities cannot compete meaningfully with Edison for nonfirm purchases.

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The real question is whether Edison has merely played "hard ball" with the Resale Cities in the interests of its native load customers, or whether at times it has crossed this line and has used its transmission dominance to undercut the cities' efforts to lower costs to their retail customers. Based on the historical evidence, it is reasonable to conclude the latter. In sum, these

historical examples demonstrate that Edison has used its strategic control over transmission to the competitive disadvantage of other utilities, who are buyers and sellers in the relevant interregional transmission markets and in the network transmission market. The then Attorney General is correct that it is reasonable to infer that the merged utility, dominated by Edison, will continue Edison's past transmission access policies, unless effective mitigation measures are imposed.

* * *

A second issue bearing upon present circumstances is the already heavily concentrated state of transmission markets, as noted by DRA and the then Attorney General. The latter's expert testified that the majority of available capacity from the SW during 1993 to 2000 is controlled by Edison. He asserts that this control, combined with Edison's transmission access policies, has effectively forced other utilities to attempt to build new transmission lines not otherwise needed. The testimony that Edison engineered the LADWP swap to remove LADWP as a participant in the Mead-Adelanto project, in order to prevent or hamper construction of that line (Mays, RT 5126-30), is undisputed. This is also disturbing because Mead-Adelanto is one of the planned lines upon which Edison relies in countering adverse testimony concerning its transmission access policies.

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Element No. 4, feasibility of access, raises issues discussed previously in connection with native load customer demands. We do not contemplate a requirement that applicants share an essential facility if such sharing would be infeasible or otherwise would inhibit their ability to serve customers adequately. It is true that pro-competitive access to transmission lines must be tempered by native load requirements. However, the record is undisputed that, notwithstanding the demands and needs of native load customers and the obligation to serve, the merger partners have historically provided transmission access to others for purposes not related to native load needs. Network facilities are built to serve Edison's

entire service area load, including the load of the Resale Cities. And, import transmission lines are built with a view to the needs of total load area requirements, including those of the Resale Cities. These determinations are consistent with previous findings on the merger's competitive impacts in the defined transmission markets.

The fact that ratepayers may ultimately benefit from this redistribution of wealth if the price of SW nonfirm bulk power is depressed is not a justification for ignoring the competitive injury to the SW shot-term bulk power markets associated with the exercise of buyer market power. Ratepayers may be short-term winners, but will be long-term losers if there are adverse long-term efficiency consequences of the merged company's exercise of buyer market power in this market. Therefore, it would be shortsighted to ignore or minimize the consequences of the exercise of buyer market power just because it may favorably impact California ratepayers in the near term.

Findings of Fact

100. the effect of Edison's actions in connection with the claimed line-loading problems preventing Nevada Power from selling power to Vernon, was to shift a portion of the loop flow burden to NPC, while also precluding Vernon's purchase from NPC.

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102. Edison has the ability to supply nonfirm transmission to the Resale Cities on a pre-scheduled basis, and there is no operational impediment issue which would support Edison's refusal to schedule nonfirm transmission more than one hour in advance; Edison would retain the ability to interrupt pre-scheduled ITS to the same extent and on the same terms as interruptible transmission provided on an hour-by-hour basis.

103. Without the ability to pre-schedule, the Resale Cities cannot meaningfully compete with Edison for nonfirm purchases.

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105. The above-noted historical examples demonstrate that Edison has used its strategic control over transmission to the competitive disadvantage of other utilities, who are buyers and sellers in the relevant interregional transmission markets, and who are located in the network transmission market.

106. Applicants do not dispute the fact that Southern Cities have borne a proportionate share of the Pacific Intertic costs, as well as the cost of Edison's transmission facilities in general, through their wholesale and fully-allocated transmission rates.

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109. Edison controls the majfority of available [transmission] capacity from the SW during 1993 to 2000, and this control plus Edison's transmission access policies have effectively forced other utilities to explore the construction of new transmission lines that might not otherwise be needed.

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117. Several new transmission lines currently under study will not be constructed in sufficient time to constitute effective ease of entry under § 3.3 of the Merger Guidelines; Edison is making no effort to construct DPV2 prior to 1997, and seveal other lines are either on hold or in the study phase (Mead-Phoenix, Mead-Adelanto, and Utah-Nevada).

118. In the case of the Mead-Phoenix, Mead-Adelanto, and Utah-Nevada proposed transmission lines, LADWP's role is crucial to the participation of the Resale Cities, and its absence may adversely affect the viability of these projects from the

prospective of the Resale Cities, thus vitiating an ease of entry determination under § 3.3 of the Merger Guidelines.

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130. Notwithstanding the demands and needs of native load customers, and the obligation to serve, the merger partners have provided transmission access to others for purposes not related to native load needs.

131. Network facilities are built to serve Edison's entire service area load, including the Resale Cities' load, and import transmission lines are built with a view to the needs of total load area requirements, including those of Resale Cities. These determinations are consistent with previous findings on the merger's competitive impacts on the defined transmission markets.

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133. Given the geographic impediments associated with the Cajon and San Gorgonio Passes, the relevant transmission lines between California and the SW are nonduplicable. Furthermore, the physical constraints noted by intervenors in connection with the L.A. [Edison] Basin and service area facilities also indicate that these lines are nonduplicable.

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